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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE
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SOFTVIEW LLC,
Plaintiff,
v.
APPLE INC., AT&T MOBILITY LLC, et al.,
Defendants.
: CIVIL ACTION
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:
:
NO. 10-389 (LPS)
:
- - -

Wilmington, Delaware
Thursday, May 3, 2012
Oral Argument Hearing

BEFORE: HONORABLE LEONARD P. STARK, U.S.D.C.J.

APPEARANCES:

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and

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18 P R O C E E D I N G S

19 (REPORTER'S NOTE: The following oral argument
20 hearing was held in open court, beginning at 10:01 a.m.)

21 THE COURT: Good morning, everyone.

22 (The attorneys respond, "Good morning, your
23 Honor.")

24 THE COURT: Let's start by putting your
25 appearances on the record for me, please.

MR. CAPONI: Good morning, your Honor. Steve

1 Caponi from Blank Rome for SoftView. With me today is
2 Morgan Chu and Sam Lu from Irell & Manella.

3 MR. CHU: Good morning, your Honor.

4 MR. LU: Good morning.

5 THE COURT: Good morning.

6 MR. FINEMAN: Good morning, your Honor.

7 THE COURT: Good morning.

8 MR. FINEMAN: Steve Fineman from Richard Layton
9 & Finger. At counsel table with me today is Rod Thompson
10 from Braun & Martel.

11 We were just going to let all the defendants
12 introduce themselves as they spoke today but if your Honor
13 would like to do introductions now.

14 THE COURT: Yes, let's get it done right up
15 front.

16 And, Mr. Fineman, who are you on behalf of?

17 MR. FINEMAN: Dell, your Honor.

18 THE COURT: Dell. Thank you.

19 MR. HORWITZ: Good morning, your Honor. Rich
20 Horwitz from Potter Anderson on behalf of Apple and AT&T;
21 and with me today from Gibson Dunn & Crutcher, Josh Krevitt
22 and Stuart Rosenberg.

23 MR. ROSENBERG: Good morning, your Honor.

24 THE COURT: Good morning.

25 MR. SHAW: Good morning, your Honor. John Shaw

1 from Shaw Keller for the HTC parties.

2 THE COURT: Okay.

3 MR. POFF: Good morning, your Honor. Adam Poff
4 on behalf of Samsung. And with me are Kindra Baer from
5 Covington & Burling and Bryan Richardson from Samsung.

6 THE COURT: Welcome.

7 MR. SMITH: Good morning, your Honor.

8 THE COURT: Good morning.

9 MR. SMITH: Rodger Smith from Morris Nichols.
10 I'm here today with Bill Boice from Kilpatrick Townsend on
11 behalf of AT&T and Motorola; and I'm by myself on behalf of
12 Sony Ericsson.

13 THE COURT: Thank you.

14 MS. HEANEY: Good morning, your Honor. Megan
15 Heaney from Phillips Goldman & Spence on behalf of Kyocera.
16 With me today is Michael Dorfman from Katten Muchin.

17 THE COURT: Okay. Thank you.

18 MS. HEANEY: Thank you.

19 MR. STUHLMAN: Good morning, your Honor. Greg
20 Stuhlman from Greenberg Traurig here in Wilmington on behalf
21 of the LG defendants. With me today is my colleague Herbert
22 Finn from my firm's Chicago office.

23 MR. FINN: Good morning.

24 THE COURT: Good morning.

25 MR. COTTRELL: Good morning, your Honor.

1 THE COURT: Good morning.

2 MR. COTTRELL: Fred Cottrell from Richards
3 Layton for the Huawei, Futurewei defendants. With me is
4 Scott Partridge.

5 MR. PARTRIDGE: Good morning, your Honor.

6 MR. COTTRELL: And Eliot Williams from the Baker
7 Botts firm.

8 THE COURT: Okay.

9 MR. COTTRELL: Thank you, your Honor.

10 THE COURT: Last but not least; right?

11 MR. COTTRELL: Yes, that's correct, your Honor.

12 THE COURT: All right. Well, I wanted to do
13 that not to give you a short shrift but we have a lot to
14 cover today and I want to move through it fairly quickly; in
15 fact, more quickly than you all may have intended. I know
16 we gave you 90 minutes a side but I'm not going to be able
17 to give you the full 90 minutes per side and I don't think
18 it will be necessary.

19 Let me tell you my inclinations with respect to
20 some of the motions.

21 I am inclined on the 299 issue to grant the
22 motion for severance, to the extent that the defendants seek
23 separate trials as being required under Section 299.

24 I am not inclined to dismiss; and my main
25 concerns are how we're going to coordinate and/or consolidate

1 for pretrial purposes.

2 On the motion to stay pending reexam, I'm
3 inclined to deny those motions and keep these cases moving
4 forward here in a litigation posture.

5 As a result, what I need the most help on
6 really are the motions to dismiss based on the allegations
7 of indirect infringement and willful infringement. I want
8 to move to those as quickly as we can but I want to give you
9 a chance to see if you can either confirm my views or change
10 them on the inclinations I have announced to you on the
11 other motions.

12 So the way we'll proceed is I want to first hear
13 from any defendant who wishes to talk about the 299 issue;
14 and once all the defendants who wish to be heard on 299 have
15 been heard, we'll let the plaintiff respond once and then
16 we'll see if defendants have anything to add. Then we'll
17 do the same thing on the motion to stay pending reexam,
18 hear from all of the defendants, then give the plaintiff one
19 chance to respond and then see if there is anything left for
20 the defendants to say and then we'll get you focused on the
21 remaining motions to dismiss.

22 So with that, I will turn it over to whoever
23 wishes to speak first on the defense side on the 299 issue.

24 MR. THOMPSON: Thank you, your Honor. Rod
25 Thompson for Dell. I think I can be quite brief on Section

1 299 given your Honor's comments.

2 Just to orient us all on dates. This case
3 was filed May 10, 2010. Almost 15 months later, the new
4 defendants were added, on September 30, 2011. In between,
5 the reexaminations were filed. That had been pending five
6 months before my client even heard of this action.

7 Also coincidentally, in September, Congress
8 enacted 299 and made clear that it was designed to address the
9 problems occasioned by the joinder of defendants, sometimes
10 numbering in the dozens, who have tenuous connections to the
11 underlying disputes in patent infringement suits.

12 This case fits it to the "T." I'm happy to
13 talk about why, as to these defendants, the new defendants,
14 the action was not commenced and 299 applies. It sounds
15 like your Honor may have reached the same conclusion, so
16 I'll hold my breath on that.

17 THE COURT: I think it's best to see if
18 plaintiff has anything that could persuade me otherwise
19 since I'm with you at this point.

20 MR. THOMPSON: Okay. So the remaining issue
21 then is severance. Certainly, I think that is within the
22 Court's discretion whether to dismiss or sever and the
23 severance is perfectly appropriate.

24 What does that mean? We just want to be sure
25 that the severance is effective now. That it's not a matter

1 of delaying it until all the pretrial proceedings are taken
2 care of and just worry about separate trials.

3 THE COURT: Why is that? Why not just put off
4 the issue of how many trials or whether in fact they'll be
5 separate until the pretrial conference?

6 MR. THOMPSON: Well, putting off the issues
7 of trials until the final pretrial conference in each case
8 makes sense and certainly coordination of all the cases
9 makes sense as a matter of sound case management. I think
10 all the defendants would agree that, for example, the
11 Markman proceeding, you obviously have great efficiencies
12 from doing it all at once with all of the separate cases.

13 However, there is a lot of other burden on
14 defendants from pretrial, from discovery, from experts. And
15 what Congress has said is that the problems occasioned by
16 that, by lumping together dozens of defendants together in
17 one case in pretrial is not tolerable and they fixed it with
18 299.

19 So, your Honor, what we would suggest is to
20 sever each of the cases now, to look at and perhaps give the
21 parties a chance to make suggestions to your Honor how best
22 to move forward now. Coordinating as much as we can on
23 claim construction and Markman proceeding and having one
24 common hearing.

25 But with other things such as discovery, for

1 example, my client Dell happens not to sell the product that
2 are accused here anymore. They were not very successful.
3 We are a little bit indifferent. I know many of the
4 defendants behind me have very successful products. So each
5 one would have different issues and it can be handled in
6 different ways.

7 So the severance should take place now pursuant
8 to 299; and I think the parties in the court can work on the
9 coordination as your Honor envisioned.

10 THE COURT: Okay. Thank you.

11 MR. THOMPSON: I would like to talk later about
12 the stay.

13 THE COURT: Yes, later on.

14 MR. THOMPSON: One final note. By severing
15 now, it makes your Honor's determination about the stays
16 much more easy then. That's one example of case management
17 efficiencies that can be achieved by severing right now.

18 Thank you, your Honor.

19 THE COURT: Does anybody else want to be heard
20 on just on the 299 issue?

21 MR. PARTRIDGE: And, your Honor, I may be
22 jumping ahead. If I am, I will sit right back down but it
23 was the part of your initial statement about coordinating
24 for pretrial.

25 THE COURT: Coordinating.

1 MR. PARTRIDGE: If you want to discuss that
2 separately, I'll take my seat.

3 THE COURT: I want to hear coordinating now.

4 MR. PARTRIDGE: Okay, very good. I represent
5 Huawei. We're one of the added defendants.

6 We moved for a severance and then moved for a
7 stay. We didn't seek the dismissal. We think that separate
8 trials are required here as your Honor has indicated and
9 intends to rule.

10 From our point of view, your Honor, this now
11 becomes really sort of a Rule 42 case management issue for
12 you for purposes of pretrial. And it seems to us, given
13 that we are a year and-a-half later in all of this than AT&T
14 and Apple, and even though we worked out a schedule pending
15 your Honor's ruling on these matters, it seems to us there
16 are some things that you will want to do with everybody
17 involved. For example, I wouldn't suggest to you that you
18 have multiple Markman hearings. You ought to have one
19 Markman hearing. And,

20 I wouldn't suggest to you that we not produce
21 the core technical document that are required in accordance
22 with your Honor's order. That we ought to do those things
23 that are appropriate for the Markman hearing.

24 Then the question becomes what else do we do if
25 anything? It's clear, I think, your Honor, that you are

1 going to need to have pretrial handled differently for the
2 different defendants because you are not going to be able to
3 try these cases all at the same time.

4 There is going to be a set of trials. Maybe
5 some parties will fall by the wayside before we get there,
6 but you're going to need a set of trials. And it makes
7 sense to have a set of pretrial proceedings that match the
8 timing of those various trials. And it may well be as we
9 get further down the road that your Honor looks at the
10 situation and the earlier case, the Apple, AT&T case, and
11 you may say and we may argue to you at that point in time,
12 let's have that trial go first, see how the jury comes
13 back and how your Honor feels about the jury verdict and
14 post-trial motions before you set us for trial.

15 Given that we are not competitors with SoftView,
16 and this is a money case, that is what it is about, it seems
17 to us that we ought to set aside oppressive discovery. And
18 I think it could be oppressive within a case like this, it
19 could be substantial at least, and it will be expensive;
20 that we narrow what we do between now and the time of our
21 trial.

22 So my preference would be to have discussions
23 with SoftView's counsel about what makes sense, agree that
24 we go forward with Markman, but get back to you on what
25 makes sense with respect to everything else.

1 Thank you, your Honor.

2 THE COURT: Thank you. Do any of the other
3 defendants want to be heard on 299, including the
4 coordination? No.

5 Okay. Let's hear from plaintiff.

6 MR. CHU: Thank you, your Honor. Good morning.
7 Morgan Chu on behalf of SoftView.

8 Let me first address the law of Section 299
9 and the case law; and then, second, I want to address the
10 practical issues which your Honor has rightfully focused
11 upon.

12 Well, what is the law for Section 299? The
13 statute doesn't provide clear guidance on what is meant by
14 when an action is "commenced" so we look to the case law
15 logic and practical issues.

16 So what is the principal case law? Well, the
17 case law we cited, *Buller Trucking*, we cited the *Wallace*
18 case and other cases, I think they're set out well in the
19 brief so I want to focus upon the case that the defendants
20 rely most heavily and almost singularly, and that is the
21 *Farina* case. It involves a different statute but it does
22 involve a question of when an action commenced.

23 The choice there was did the action commence on
24 the date where there was a filing that first named the new
25 defendant or an earlier date, which was the original

1 complaint, where the new defendant was not named at all?

2 The *Farina* case held that it was the date based
3 on the filing when the new defendant's name first appeared
4 and not the earlier date of the original complaint where
5 there was no mention of the new defendant.

6 If anything, that case supports SoftView's point
7 of view because our position is in April of 2011, five
8 months before the Court granted leave to amend, all of these
9 defendants had been named in a filing. We're not seeking to
10 have it as of an earlier date such as the original complaint
11 but we are saying that it is almost five months before the
12 effective date of the AIA.

13 Another way to look at it, on a practical basis.
14 Let's suppose a party is awaiting action from the Court and
15 the Court, this Court and all courts in the federal system
16 are incredibly busy, and we see the approaching date of the
17 effective date of AIA and suppose we think all of the
18 defendants who use the Android operating system, which is
19 the principal basis for the infringement, ought to be in one
20 case instead of split up into tiny little multiple cases.

21 Well, we could have, on September 15th, after
22 waiting four and-a-half months, simply filed a new complaint
23 against that. It's really more than eight defendants, but
24 grouping them, eight defendant groups, we would have filed a
25 unified complaint and that is what the action would be

1 before the Court. So there is the practical issue, too.

2 THE COURT: Well, talking about practicalities,
3 maybe you could have but you didn't. And as a practical
4 matter, for instance, did you serve the amended complaint
5 on the other defendants, the eight groups of them prior to
6 September 30th?

7 MR. CHU: We did not. We know to a certainty --

8 THE COURT: If you had served discovery on them
9 and they weren't really in the case, but if they had
10 complied with my discovery procedures and objected to your
11 discovery saying, hey, we're not a party yet, you think I
12 would have allowed you take discovery from them prior to
13 September 30th?

14 MR. CHU: Well, the answer there would be no.

15 THE COURT: And what if I had ultimately denied
16 your motion for leave to amend? How could it possibly be
17 that this action commenced against them in April when let's
18 say on September 30th, I said I'm not granting leave to
19 amend?

20 MR. CHU: So what we have to do is both look
21 at the text of the statute; and, as they said, it didn't
22 provide any guidance; we look at the case law in analogous
23 areas. We think the case law, including their principal
24 case, supports us. And now I'm getting to the practical
25 issues that the Court is addressing.

1 It is clear, of course, although we could have
2 filed on September 15th, we didn't. I should mention one
3 of the groups of defendants did file a declaratory relief
4 action in another District. So they plainly knew about it.
5 And when we look carefully at the flurry of papers from all
6 the defendant groups, we didn't see a clear statement from
7 any of the other defendants saying that they were unaware
8 of our filing to seek to add them to the case.

9 THE COURT: That may be the case, but I mean the
10 way our system works, you have to be served. You have to be
11 named as a party, and you have to be served. Before that,
12 you could be sitting in court, you could know everything
13 that is going on, but you have no legal obligations. You
14 are not a party.

15 MR. CHU: I understand that, your Honor. What
16 we're trying to do is to see whether the AIA applies to this
17 case. Let me get to some issues that are partially practical
18 and partially why we care about the word "commenced" in
19 different circumstances.

20 Some of the cases relied upon by both sides have
21 to do with the statute of limitations. There, I think there
22 are real practical concerns from the point of view of the
23 defendants because we have statutes of limitation so that
24 the passage of time doesn't lead to the destruction of
25 documents, the fading of witness memories, and the like.

1 So we don't want a defendant to be prejudiced by
2 the passage of time unless they have the actual notice of
3 the complaint. But, here, those issues aren't present. The
4 issues present here boils down to, should this be a single
5 action or should it be carved up into individual actions.
6 Because even if our initial filing was actually five months
7 later than it actually was, so after the effective date, we
8 would still be arguing that this is a case where that group
9 of defendants should be together. So let me address that
10 and then I also want a little bit of time to address the
11 coordination of issues.

12 So let's assume for the moment that the AIA
13 applies for the purposes of discussion. Is the infringement
14 by all of the Android defendants the same?

15 The answer is yes. There is nothing they add or
16 subtract to the Android operating system where all of them
17 get that operating system from the same supplier, Google.
18 There is nothing different, hardware or software, relevant
19 that is added by any of those defendants for the patents
20 before this Court.

21 THE COURT: Is this your WebKit argument or is
22 this now a different argument?

23 MR. CHU: It's somewhat different. The WebKit --

24 THE COURT: Is it in the complaint? Is it in
25 the briefs? Or is it brand new?

1 MR. CHU: It certainly is in the briefs, the
2 fact. Let me just explain the fact the WebKit argument.

3 THE COURT: You have got a new argument and you
4 are not on the WebKit argument.

5 MR. CHU: No, I just want to explain the context
6 because you are right, your Honor, to call that out.

7 The initial complaint against Apple is based on
8 the Apple operating systems. It operates in a certain way
9 that when you open a browser page, you can pinch it, make
10 it smaller, or you can use your fingers to widen it, to zoom
11 in. That same feature is used by Google and all of the
12 Android defendants with respect to the Android operating
13 system.

14 The WebKit argument, I'm going to put aside
15 for a moment because we are saying that WebKit is in common
16 between Apple on the one hand and all of the Android
17 defendants on the other. So it's a related but separate
18 argument.

19 What I am saying with respect to all of the
20 Android defendants, there is not one issue of validity or
21 infringement that will be different in this case at any
22 time. And despite attempts by some of them to suggest
23 otherwise, one would have to scratch one's head a lot to
24 understand those arguments they make.

25 The core issue is that they used the Android

1 operating system and it has this pinching-like technology
2 that we allege infringes the patent. So even if AIA does
3 apply, that group at least should stay together.

4 Now, we also think, because it is the same basic
5 technology, although Apple implanted it in its operating
6 system, that it should be the same case for all. Now, here
7 is what the defendants would like to have. Ultimately, at
8 trial, they want to have nine separate trials.

9 Well, why is that? Well, there will be a
10 scramble, as in law school, to sit in the back row because
11 number nine gets to see eight other juries; and if any one
12 of those find that the patents are invalid, then number nine
13 will say we win automatically.

14 The validity issues will be the same. They
15 ought not to be tried separately. The infringement issues
16 are the same. They ought not to be tried separately. And,

17 Then there is the question about damages. We
18 just heard an argument about Dell that they're in a unique
19 situation. Well, that they have very, very small sales. I
20 will accept counsel's representation. It's very small
21 infringing sales based on the Android operating system and
22 so the numbers at trial will be different.

23 But the question of whether there should be a
24 unified trial for all purposes or a unified trial on all
25 issues but for damages is a question that can be left for

1 another day.

2 Now, what about discovery and everything in
3 between? Let's just assume whether your Honor believes AIA
4 doesn't apply or does apply and nevertheless this group of
5 defendants should be together.

6 Well, there will be the deposition of the two
7 inventors. We think there should be one deposition of each
8 of those inventors, not nine depositions. There will be
9 other depositions of SoftView representatives or SoftView
10 witnesses or expert witnesses; and, again, since the issues
11 are all alike, there ought to be individual depositions.

12 Now, as a matter of case management, because the
13 Android defendants do compete with each other, it would make
14 sense -- and it would make sense if this case was filed as a
15 unified case two years ago -- if one of the defendants said
16 we want the deposition for our damages to be separate
17 without other counsel or representatives sitting in there.

18 Well, we can understand that. Protective orders
19 are often fashioned to limit that exchange of information.

20 So this is actually precisely the kind of case
21 where the AIA recognizes there should be multiple defendants
22 and practical issues for trial and later can be decided with
23 more information by this Court.

24 Let me give you one other example, your Honor.
25 In this Court's order with respect to the 20 claims of the

1 issue, we identify 20 claims that we're asserting against
2 Apple. This Court handwrote in the proposed order that with
3 respect to the new defendants, they must be selected from
4 among those 20 claims. It's a matter of case management and
5 efficiency.

6 Well, let's say we have nine separate cases.
7 Let's say some of defense counsel will get up and try to
8 argue that their infringement or the basis of infringement
9 are really different.

10 Well, then we ought not to be limited to the
11 same 20 claims. That would necessarily follow. We could
12 assert 20 claims against Apple, and a completely different
13 20 claims against Dell, and a completely 20 claims against
14 Kyocera. That would logically follow.

15 We respect your Court's earlier order recognized
16 that this case has core issues of validity and infringement
17 that bridge all of the defendants and further matters on
18 case management such as exactly how trial ought to be
19 conducted is best left for another day.

20 Thank you, your Honor.

21 THE COURT: Thank you. Is there anything from
22 defense?

23 MR. THOMPSON: Thank you, your Honor. Let me
24 respond briefly to both of Mr. Chu's points.

25 With respect to the case law, I'll be very brief

1 because I don't think I need to persuade you. But the
2 Circuit court law, *Farina*, *Braud*, and *Prime Care*, which are
3 all cited in the papers, are very clear that a new action is
4 commenced every time a new party is added.

5 The *Buller Trucking* case that Mr. Chu is
6 relying on didn't add new parties. As a matter of fact, it
7 distinguished itself from other situations because it didn't
8 add new parties. It was amending to create a class action
9 for the first time; and that is the context in which that
10 District Court in Illinois made the holding that filing the
11 motion was the effective time.

12 The Circuit court authority is very clear. And
13 by the way, Rule 3 itself commence a new case by filing a
14 complaint. The complaint was filed here on September 30th.

15 Mr. Chu also mentioned that no defendant had
16 said that they didn't have notice. Well, Dell, in our
17 papers, attested to that. We had no notice of this case
18 until we were served, until the filing of this case.

19 THE COURT: What about the argument that the
20 infringement issues are the same among all of Android
21 defendants?

22 MR. THOMPSON: I think your Honor asked exactly
23 the right question. Is that in the complaint? The answer
24 is no. It's not in there at all.

25 I think the WebKit is now in a fourth amended

1 complaint for the first time. Mr. Chu said he has a new
2 theory that is not the WebKit theory.

3 For purposes of 299 and joinder, look at the
4 allegations of the complaint. And let's go back to 299
5 because it's very clear on its face.

6 It requires joinder only if, only if the right
7 to relief arises out of the same transaction occurrence or
8 series of transactions. That's number one. It has to be
9 the same series of transactions.

10 Relating to the same accused product or process.

11 I have, Dell received this last Friday, Dell's
12 accused models. There are four, actually five Dell-branded
13 products. This is the accused product. None of the other
14 defendants make these products. No other defendants know
15 the hardware or software that goes into these products.
16 These are the accused products.

17 So, your Honor, neither of those elements are
18 established in 299. It is not the same series of transactions.
19 Obviously, Dell sells to its own chain, its own suppliers,
20 its own service providers, and it's a different product.

21 If Mr. Chu has a new theory, it's not in the
22 complaint. It can be tested if, and when, it ever gets
23 pleaded because 299 looks at the allegations of the complaint.
24 Clearly, under 299, severance at each of the separate
25 defendants is warranted.

1 THE COURT: And what about the validity issues?
2 Those are certainly going to be the same, aren't they?

3 MR. THOMPSON: Some validity issues will
4 undoubtedly be the same, depending on which.

5 THE COURT: And does 299 allow the Court to have
6 a single consolidated trial on validity?

7 MR. THOMPSON: 299 doesn't speak to that, so you
8 fall back on the case law under Rule 42. If efficiencies can
9 be achieved, I suppose that will be your Honor's discretion to
10 try to fashion something. I guess the issues will not be the
11 same as the case develops. Different defendants might have
12 different theories.

13 THE COURT: Okay. Thank you.

14 MR. THOMPSON: Thank you, Your Honor.

15 MR. PARTRIDGE: May I, your Honor?

16 THE COURT: Yes.

17 MR. PARTRIDGE: Let me start where you just left
18 off, if I may.

19 I don't think there is a clear answer about
20 validity trials. When you look at Section 299, Subparagraph
21 B, it reads: Accused infringer may not be joined in one
22 action as defendants or counterclaim defendants or have
23 their actions consolidated for trial.

24 So once we're severed, which I think the law
25 requires, I'm not sure that you can hold a common validity

1 trial for all of these defendants.

2 That said, your Honor, you raise a very
3 interesting question, and one that I think the defendants,
4 if you were interested in bifurcating this and having a
5 validity trial first, we haven't discussed that. I don't
6 know whether my client would be interested in that, but
7 that is one of the interesting case management approaches
8 that you could consider.

9 I don't think you could necessarily order us
10 to do that under the law, but we could consider agreeing to
11 something like that.

12 So, as a matter of law, I think the answer is
13 no. As a matter of trying to work things out and do what
14 makes sense, that is perhaps possible.

15 With respect to the argument that Mr. Chu made
16 about different claims against different defendants, well,
17 your Honor, if you did that, a Markman hearing would be
18 probably far less manageable than what you would hope and
19 what we would hope as defendants because now we would have
20 a lot more claims with a lot more claim terms potentially
21 in dispute. And I think that is something you could manage
22 by virtue of Rule 42 amongst these now different cases. I
23 don't think it makes sense to allow different sets of claims
24 against different defendants because of the Markman issue.

25 The third point I would make, your Honor, is

1 that the operating system that is at issue here amongst the
2 new defendants, the Android system, as you know is an open
3 source system. The implementation of that open source
4 system I have no doubt varies amongst the defendants.

5 I know that some variations were made by my
6 client. At this point in time, I actually don't know what
7 those variations are. Why? I don't even have infringement
8 contentions yet from the plaintiff to know how to respond
9 to the WebKit argument that Mr. Chu made.

10 Are the issues likely to be the same? Is he
11 going to take that position once he has discovery of our
12 different products and sees in fact there are variations
13 that have been made?

14 I think the way to deal with this case, as I
15 said previously, sever them as you have indicated, require
16 the parties to then go back and come back to you with a
17 proposal as to how to manage the discovery process.

18 We'll all be together for Markman. I think that
19 makes sense.

20 Beyond that, the issues such as inventor
21 depositions, is it appropriate for us to have common
22 inventor depositions with an agreed number of hours and a
23 division of those hours amongst the defendants? That may
24 be possible and that may be appropriate. And there are a
25 number of other things that perhaps we should be doing here

1 and managing the cases.

2 But, unfortunately, I think we're in a position
3 now where it makes some sense for us to consult and get
4 back to you within a relatively short period of time as to
5 further recommendations as to how to phase what happens in
6 these cases now that they're severed.

7 Thank you, your Honor.

8 THE COURT: Is there any other defendant on 299
9 consolidation?

10 Mr. Chu, I will give you the last word because I
11 haven't been persuaded to change my mind, but I will give
12 you one more shot, if you wish.

13 MR. CHU: I feel like Casey, Mighty Casey coming
14 to the plate. I hope the outcome isn't similar.

15 Your Honor asked a very good question about the
16 operative pleading.

17 One example in paragraph 28, it states in part,
18 "Samsung makes, uses, imports, offers to sell, and sells
19 devices having the Android operating system and web browser,
20 including, but not limited to," and then there is a listing
21 of the trade names under which they sell the devices.

22 That beginning language, by my quick scan,
23 forward and backwards, is identical for all of the Android
24 defendants. What is accused of the infringement is the use
25 of the Android operating system and the web browser.

1 The AIA, again, assuming for purposes of
2 discussion that it applies, recognizes when there are common
3 issues such as common issues of infringement, infringement
4 by the same methods or an apparatus as there are here, there
5 should be a single case. And that makes sense for all
6 purposes, although the Court retains the discretion, when we
7 get to trial, to order trial to be tried in a manner that is
8 efficient.

9 So the practical situation as well as the
10 statute would command that there should be a single case
11 here for the infringement by the Android operating system
12 and web browser.

13 THE COURT: How is your reading of the complaint
14 any different than saying everybody infringes patent number
15 X and we're just going to call out some specific different
16 products for each of the different defendants? How is that
17 any different?

18 MR. CHU: Well, I'm not sure I'm capturing the
19 Court's question, but let me try.

20 THE COURT: First, let me ask you this: Do
21 you agree if the AIA applies and your allegation is simply
22 everybody infringes the same patent, but everyone has
23 different products, each of the defendants have different
24 products, don't you agree that that would be a case that
25 Congress intended by the AIA to be severed?

1 MR. CHU: I disagree, your Honor, respectfully.

2 I think what Congress had in mind is a situation where
3 plaintiff says, I have a patent and these 50 defendants
4 infringe that patent, and Defendant 1 infringes with a
5 particular kind of device that is a mouse-pointing device
6 and Defendant No. 2 infringes with a TV clicker and
7 Defendant No. 3 infringes with a device for controlling a
8 model airplane that have nothing in common.

9 This is more like the following kind of case:

10 If you have an infringement by the Microsoft Windows
11 operating system and the infringement is basically caused --
12 I'm not being technical in terms of patent law -- but it is
13 basically caused in the way in which the operating system
14 operates, then whether Dell puts that operating system on a
15 Windows compatible computer or some other Windows compatible
16 computer maker does makes not one whit of difference for
17 purposes of infringement.

18 So Congress saw the world in two parts. You
19 can't have this willy-nilly 50 defendants with completely
20 different bases for infringement in one case, but if you
21 have a group of defendants where there is one basis and it's
22 not based on you infringe my patent but you infringe my
23 patent by doing A,B,C and D, and they all do it in exactly
24 the same way -- and they do here because they all use the
25 same Android operating system. The defendants recognize

1 that, and the operative pleading so alleged.

2 One other small point on case law. The cases
3 argued by both sides a number of those cases relating to
4 that other statute. The CAFA statute has to do with
5 removal. And, of course, as your Honor knows, there is a
6 time limit of 30 days for defendant to remove a case.

7 So you can see the obvious prejudice if it
8 relates back to an original complaint that never even had
9 the defendant's name in it as opposed to when there was a
10 pleading that had the defendant's name. It makes sense in
11 that circumstance.

12 This is a completely different circumstance
13 where the better management and following the dictates of
14 Congress, even if AIA applies, would be keeping these
15 defendants together in a single suit.

16 Thank you.

17 THE COURT: Are you prepared to represent today
18 that you already understand each of the defendants' systems
19 well enough to know that they all infringe in precisely the
20 same way and I guess commit to that so that if any defendant
21 can say actually I don't infringe in precisely that same
22 way, then suddenly they're out of the case?

23 MR. CHU: The infringement is from the Android
24 operating system, and it's this functioning Android operating
25 system. And they all do it in the same way, because they

1 don't write their own.

2 THE COURT: They're representing that there are
3 some potential modifications in how they implement it. It's
4 an open source program, and we may find -- I mean that is the
5 question. There is going to be discovery. You're confident
6 that you are not going to find anything in discovery that
7 distinguishes any of the defendants, not even one of their
8 products, from any other on the infringing technology.

9 MR. CHU: I believe that is the case, your
10 Honor. I can't be absolutely certain to tell you what is
11 behind the curtain. But it's a function that operates the
12 system. Someone has got to be crazy to go in and rewrite
13 that code because they're going to end up injecting all
14 kinds of bugs that might not only affect the operation of
15 these particular functions but it might affect the rest of
16 the operating system.

17 So maybe if one of the defendants is truly
18 insane, they've made some changes and maybe that is why
19 someone didn't have such great sales, which they may drop
20 out anyway. But I believe that we will find that what
21 infringes is from the Android operating system and it's
22 identical across the defendants.

23 Here is another way to look at it as a practical
24 matter. There is no harm by keeping the case together now.
25 If, by chance, my confidence is shaken and we find out that

1 there truly are differences, the Court can always revisit
2 the issue at that point in time.

3 Thank you, your Honor.

4 THE COURT: Thank you.

5 All right. Well, there are interesting
6 arguments; and there is, in the Court's view, no case law
7 that answers the question that is put before me today with
8 respect to the multiple motions under Section 299. But I have
9 not been persuaded to alter my conclusion, notwithstanding
10 the interesting points that have just been made before me.

11 So we will enter a written order that grants
12 each of the 299 motions to the extent that they seek
13 severance for purposes of separate infringement trials.

14 In all other respects, at this point the relief
15 requested by the defendants is denied.

16 Let me say just a few things about how I reached
17 that conclusion. In the Court's view, the statute, the new
18 statute Section 299 does apply because this action was not,
19 in the Court's view, commenced against the Android defendants
20 until the motion for leave to amend was granted, which was
21 September 30th, which obviously postdates the September 16th
22 adoption or enactment of Section 299.

23 In the Court's view, the filing of the motion
24 for leave back in April did not commence an action against
25 the Android defendants. It simply asked for permission to

1 commence such an action. There was never any guarantee
2 that that permission would be granted; and had it not been
3 granted, it would be very odd to view an action as having
4 been commenced in April when in September the request for
5 permission to commence it was denied.

6 Furthermore, nothing that would have to occur
7 upon the commencement of an action such as service of the
8 complaint and discussion of discovery and scheduling and
9 potential service of discovery, none of that did happen or
10 indeed could have happened in the time between April and
11 September.

12 The cases cited by both sides in the Court's
13 view are distinguishable and none of them, of course, deal
14 with the new statute before the Court today. While the
15 Court understands as a general matter in the statute of
16 limitations context that for equitable reasons, a party
17 should not be deemed to have waived or lost a cause of
18 action it would otherwise have just by virtue of the Court's
19 taking the time it needs to resolve, for instance, a request
20 for leave to amend to add a party or to add a claim. Those
21 equitable considerations are not applicable in the context
22 of the issue as it arises today.

23 In the Court's view, this is the type of situation
24 where the statute is the statute and any intent beyond the
25 statute requires separate infringement trials. The theory

1 articulated today purporting to find a commonality, in fact
2 an identity as I understand it, among the infringement
3 allegations amongst all the Android defendants is, in the
4 Court's view, a theory that was not at least articulated
5 adequately in the briefing. It strikes the Court as a new
6 theory. It is ultimately not persuasive in any event because
7 it takes, in the Court's view, too narrow and too precise a
8 view of what has been alleged.

9 The Court simply doesn't read the complaints in
10 the same manner that the plaintiff is arguing they should be
11 read. All reasonable inferences being drawn in favor of the
12 plaintiff, it would be unusual to read these complaints as
13 being so narrowly drafted as the plaintiff argues such that
14 it would essentially, by its own admission, the plaintiff,
15 have no claim against any defendant who modified in the
16 slightest way the alleged infringing technology, and that is
17 not how the Court reads the complaints here.

18 The Court is not revisiting its prior rulings
19 with respect to the number of asserted claims or where they
20 must be chosen from.

21 The Court is certainly open to the possibility
22 of and perhaps even ordering a coordinated or consolidated
23 validity trial because it is difficult to imagine how the
24 validity issues will necessarily be different. However,
25 that is an issue that the Court would need further briefing

1 on, perhaps even there will be some case law by the time we
2 get to trial in this matter.

3 So at this point, beyond what I have ruled,
4 the only additional direction to you all is that you should
5 at this time meet and confer and, based on what I have
6 determined today, which is that separate infringement trials
7 will be necessary, barring agreement amongst the parties to
8 the contrary, discuss amongst yourselves what implications
9 that has for the schedule that has been adopted and do
10 discuss the possibility of a consolidated trial on validity,
11 and I'll see what you come up with.

12 But if you don't reach an agreement on validity,
13 that is a matter that we will have to address as we get
14 closer to the first of these trials. Because I'm not yet
15 persuaded that I lack authority to order a consolidated
16 validity trial.

17 If it turns out, as I suspect, that those
18 issues will be essentially identical among the defendants,
19 I want to hear back regarding your efforts on meeting and
20 coordinating in response to what I have ruled today within
21 14 days of today.

22 All right. Let's move on now to the stay issue.
23 Again, we'll hear first from the defendants.

24 MR. KREVITT: Thank you, your Honor.

25 John Krevitt from Gibson Dunn on behalf of

1 Apple. I will be addressing first the stay issue, and other
2 defendants may wish to be heard.

3 I heard your Honor's tentative ruling, of
4 course, and it is clear from your Honor's past practice and
5 even in the ruling just now your Honor has given careful
6 consideration to the tentative ruling. So rather than going
7 through an entire argument, I do want to make sure I focus
8 on the issues of concern to the Court.

9 I will say at the outset, which will not surprise
10 the Court, I'm prepared to explain why we think this is a
11 clear-cut case for a stay when you look at the three factors,
12 simplification, procedural posture of the case and any
13 prejudice to the defendant, each and every one in our view,
14 and I am prepared to talk about why.

15 THE COURT: Let's talk about simplification.
16 First of all, I don't know if there is any update anyone
17 can provide on the reexams. But as I understand it, 90 of
18 the claims here survived the initial Office Action without
19 amendment, without rejection, without cancellation. Is that
20 still the status?

21 MR. KREVITT: Yes, your Honor. That is still
22 the status, although there have been further proceedings
23 that I would be happy to explain to your Honor. But at this
24 moment, as we stand here or sit here, that is, that remains
25 the case.

1 THE COURT: And so what is the likelihood that
2 at the end of the day, we're going to see substantially
3 fewer than 20 of the original patent claims emerge without
4 substantive amendment?

5 MR. KREVITT: Well, your Honor, if I may answer
6 that. If I can back up a moment and provide some context
7 for the reexam, but please again let me know if there are
8 particular issues you want me to focus.

9 I think it's helpful to understand, this is an
10 unusual reexamination process in that it's not the typical
11 reexam where the party seeking the reexamination has
12 submitted a few pieces of prior art and there is a fight
13 about whether that prior art discloses a particular element
14 or not.

15 The reason for that has to do with the central
16 issue that is now being addressed in the reexam. And it's
17 this: When the '353 patent was originally filed -- there is
18 two patents in the case, as your Honor is aware. When the
19 complaint was first filed, there was only one, and then
20 another patent was added.

21 When the '353 patent was originally filed and the
22 parent application, all of the claims were limited to vector
23 claims. All of the claims had an element requiring vector
24 being used to be the method or as part of the apparatus.
25 Every claim. It was in the title of the patents, summary of

1 the invention, the abstract, every embodiment, and every
2 single claim.

3 In January of 2007, the iPhone was announced.
4 The iPhone, we will prove at the appropriate time, does
5 not use the vector technology at all. What SoftView did
6 virtually immediately thereafter was strip the '353 of the
7 vector limitations. So they changed the title of the
8 patent, they changed the abstract, the summary of the
9 invention, and many of the claims to remove in all of those
10 instances the word "vector." So the patent in SoftView's
11 contention was no longer limited to vector.

12 Some claims still had the word "vector." From
13 many other claims, the word "vector" had been removed.

14 Virtually simultaneously, they filed the '926
15 patent, which is the second patent in this case. And that
16 patent also had the word "vector" no longer originally
17 filed. It did have vector in the title, did have vector
18 in the summary of the invention. Those were all removed
19 as well.

20 So we filed a reexamination in which we sought
21 reexamination and argued that there is a substantial new
22 question of patentability as to all of the claims.

23 What the Patent Office has done so far is it
24 has agreed with Apple with respect to the claims that do
25 not have the term "vector," so all of the non-vector claims,

1 if you will, have now been rejected, and the Patent and
2 Trademark Office has thus far disagreed with respect to the
3 claims that still have the term "vector."

4 The meaning, the scope, the understanding of
5 the term "vector" indisputably is relevant to this case.
6 SoftView will not stand up and tell you otherwise. There
7 can be no dispute on that question.

8 There also can be no dispute, your Honor, that
9 that question is currently being addressed, meaning the
10 meaning, the scope of the term "vector" and related terms,
11 vector-related terms, by the Patent Office right now.

12 So Apple has submitted, in response to the Office
13 Actions that allowed the vector claims to issue, has submitted
14 additional statements. It's an inter partes reexam, as your
15 Honor is aware, so Apple is able to participate in that.

16 SoftView will have an opportunity and almost
17 certainly will take a position as to what the "vector" term
18 means. So the question of what vector means, which is
19 absolutely relevant to this litigation, will be addressed
20 in the reexam.

21 What is the likelihood of those 90 claims
22 emerging that have already been allowed, the question your
23 Honor asked? I suspect you will hear a different answer
24 from different people that stand at the podium.

25 It is our view that those claims will be

1 rejected. And we have put our money where our mouth is in
2 that respect, and we submitted expert declarations to the
3 Patent and Trademark Office.

4 We think the statements that the PTO have made,
5 the examiners have made in allowing those claims so far
6 clearly invite the submission of new prior art, which we
7 have done. We have submitted new prior art that solves
8 the problems that were identified by the Patent Office, the
9 things that the Patent Office thought the prior art was
10 insufficient to render the vector claims invalid. We have
11 now, in our view, solved those problems.

12 There is no dispute that about we have
13 responded to the Patent and Trademark Office Office Actions
14 on those points and have, in fact, because the rules require
15 it, submitted recently ex parte reexaminations, new ones
16 that submit that additional art.

17 The reason, just to be clear, I say the rules
18 require it, the rules don't require us to do anything, but
19 we're not able to submit the new art in the currently
20 pending inter partes reexam. So for the Patent Office to
21 consider it, we needed to submit the additional reexamination.

22 THE COURT: So you are continuing to fight the
23 validity before the PTO of the non-vector claims.

24 MR. KREVITT: Absolutely, your Honor. Again,
25 the Patent and Trademark Office will ultimately make the

1 decision on whether or not we're right with respect to the
2 reexaminations, but I can absolutely represent to your Honor
3 that we strongly believe that, ultimately, the Patent and
4 Trademark Office will reject those claims, and that at an
5 absolute minimum, your Honor, SoftView will take positions
6 on that question. The Patent and Trademark Office will
7 take positions on that question. The prosecution history
8 on the very issue that will be central to this case will be
9 developed, there can be no dispute on that, even if the 90
10 claims do emerge.

11 And just one point on numbers. You're correct
12 about 90 claims. Of course, there are only 20 claims
13 asserted against Apple pursuant to your Honor's previous
14 ruling. Of those, 14 have the term "vector." So we're
15 talking about six claims that do not have the term "vector"
16 that have all so far been rejected.

17 SoftView, incidentally, is fighting that, has
18 already submitted a response to the Patent and Trademark
19 Office, contending that the PTO got it wrong with respect
20 to the claims that do not have the term "vector."

21 THE COURT: So I think I had the numbers flipped
22 in my mind. Only six of the 20 that they asserted against
23 you have survived to the moment?

24 MR. KREVITT: No, I'm sorry. I made a mistake.

25 THE COURT: Fourteen have.

1 MR. KREVITT: Correct, your Honor. I'm sorry if
2 I created that.

3 THE COURT: There are 14 non-vector claims
4 asserted.

5 MR. KREVITT: Correct. No. Your Honor, I'm
6 sorry.

7 THE COURT: Okay.

8 MR. KREVITT: There are 14 claims that have the
9 term "vector" in them. It is the claims with the term
10 "vector" that have so far been allowed.

11 THE COURT: I see.

12 MR. KREVITT: Six of the claims do not have the
13 term "vector." Those six, along with all the other claims
14 that do not have the "vector" term have been rejected so far.

15 So this is a very, very, I think objectively
16 speaking, active prosecution. It is moving quickly since
17 these motions were filed. There will be continuing Office
18 Actions since SoftView put in its opposition. They have
19 filed a submission with the Patent and Trademark Office with
20 respect to the claims that have been rejected.

21 So, again, your Honor, with respect to the
22 simplification issues, it is our view that there really can
23 be no dispute that what happens in the Patent Office in
24 connection with the reexam is directly relevant to and
25 ultimately will simplify the issues in this court.

1 Just on the simplification, I would add one
2 thing. That is that SoftView has thus far not been willing
3 to agree not to amend its claims. As your Honor is aware
4 from other cases in which your Honor has denied motions for
5 stay, that is a factor that your Honor has considered.

6 Well, the plaintiff has said we're not going to
7 make this a moving target. We're going to stick with the
8 claims. If they're allowed, great. If they're not and we
9 have to amend them, we won't assert them in this litigation.
10 Thus far, SoftView has not agreed to be bound -- to not
11 amend claims and assert those in this litigation.

12 So the prosecution continues. What happens in
13 the prosecution is indisputably relevant to this litigation.
14 And what is more, claims may get amended as we go forward.
15 And those claims could be, if they are claims that have
16 already been asserted against Apple, can continue to be
17 asserted presumably in this litigation.

18 THE COURT: Now, you initiated the reexams.

19 MR. KREVITT: Yes.

20 THE COURT: That distinguishes you from all your
21 friends on the other side or on your side.

22 MR. KREVITT: Yes, your Honor.

23 THE COURT: They all seem to think it's a
24 point in their favor that they did not try to deprive the
25 plaintiff of their forum whereas you arguably did. I would

1 like you to respond to that but also more generally, do I
2 have eight, nine, or more different balances to do or do I
3 really have to decide are we staying this case as to all of
4 you or I'm not staying it as to all of you?

5 MR. KREVITT: Well, then let me answer the
6 separate questions that you asked. That will be articulated
7 by my friends as a point in their favor, certainly, and has
8 been in the papers, that they didn't file the reexam.

9 It does not follow, your Honor, and I submit
10 that it is not the case, that it is a point against Apple
11 that we did file the reexam.

12 So it has been a factor that the Court has noted
13 in prior cases that the party seeking the reexam has not
14 been the party -- excuse me -- seeking the stay has not been
15 the party that initiated the reexam, but the fact that we
16 sought the stay should not be a factor that weighs against
17 Apple in this case.

18 Here is why, your Honor. It goes to the second
19 question: the balancing. The relevant inquiry, your Honor,
20 I respectfully submit is an objective question, by and
21 large. Will it simplify the issues? What is the procedural
22 posture of the case? And will the plaintiff be prejudiced?

23 As to the simplification, we addressed that.
24 The procedural posture of the case -- and it goes to this
25 issue that we filed the reexamination. SoftView repeatedly

1 in their papers, over and over and over again, states that
2 the reexaminations were filed a year after the complaint was
3 filed in this case. And they keep hammering that point that
4 somehow militates against a stay. They have filed a case
5 and then a year later we filed the reexamination. Shouldn't
6 that mean there should not be a stay?

7 But it's the wrong question, your Honor. The
8 right question, your Honor has asked exactly this question
9 in previous decisions, is how does the relative status of
10 the litigation compare with the status of the reexamination?

11 And because of the issues that your Honor
12 addressed in the previous motion as to what happened when
13 this additional complaint was added, we're at Square One
14 essentially in this litigation. We're about to meet and
15 confer and propose a schedule to your Honor. A schedule was
16 just put in place less than a month and-a-half ago, I think.

17 There has been no depositions taken. There is
18 no trial date set in this case, your Honor. There has been
19 no claim construction process whatsoever, although it's true
20 we've exchanged, meaning Apple and SoftView, some documents
21 and some written discovery.

22 This case was put on ice essentially, your
23 Honor. And it's not been put on by the defendants as in
24 *Intellectual Ventures* case, when they moved to transfer and
25 took other steps, but it was put on ice by SoftView. I'm

1 not casting aspersions or suggesting they did anything
2 improper. I'm simply suggesting they did what they did,
3 which was take the Apple case, which was moving apace, and
4 decide to add to that case 18 new defendants or eight new
5 defendants, however you add them up, and at the same time
6 represent in their motion papers to the Court, when they
7 filed that motion, your Honor, that should your Honor grant
8 that motion, it would require a reset. It would require a
9 new schedule. Dates would all have to get pushed out.

10 So we're in a situation, your Honor, where the
11 reexams were filed in May. The complaint that broadened the
12 other defendants was filed in September. Coincidentally, the
13 same day -- excuse me -- September 30th, the same day your
14 Honor allowed that complaint to be filed. The Patent and
15 Trademark Office started rejecting claims in connection with
16 the reexamination. There has been numerous actions since
17 then. And since then, SoftView has added new complaints, a
18 third amended complaint and a fourth amended complaint.

19 The operative complaint, your Honor, to which
20 the other defendants will be answering, to which we needed
21 to file an answer, was filed in March of 2012, just two
22 months ago.

23 So when you look at where this case is, and
24 this is a fact that your Honor has addressed in all of the
25 motions to stay, both those that your Honor has granted and

1 denied, when you look at the fact that there is no trial
2 date set, no claim construction, virtually no discovery,
3 and you compare that with a very active reexamination, it's
4 clear that the procedural posture, along with the
5 simplification, also favors a stay, strongly.

6 I hope that answer your Honor's question.

7 THE COURT: Well, it does. But the broader
8 question -- because this another factor that distinguishes
9 you, which is there is some degree of estoppel that kicks in
10 because you have sought the reexam.

11 MR. KREVITT: Yes, your Honor.

12 THE COURT: Unless your codefendants surprise me
13 and say they're going to be estopped as well voluntarily.
14 That is arguably a point in your favor and a point against
15 their effort to seek a stay. But I have to manage this case
16 or cases.

17 MR. KREVITT: Yes, your Honor.

18 THE COURT: Can I stay it as to some of you and
19 not as to others or do you agree I need to make a single
20 heads-or-tails decision as to whether litigation is going
21 forward?

22 MR. KREVITT: I think the precise answer to your
23 question is yes, you can stay as to some and go forward as
24 to others. I don't think the question you are asking,
25 though, about the estoppel quite implicates that issue for

1 the following reason.

2 Given what your Honor has ruled in connection
3 with the 299 motion that we will be having separate trials,
4 subject to the point your Honor made about a potential
5 validity trial, but assuming we have separate trials, Apple
6 will be estopped from relying on prior art that was
7 submitted in connection with the reexaminations pursuant to
8 the operative rules.

9 The other defendants will take the positions
10 they take. I think you won't be surprised this morning but
11 they will take the positions they take and those positions
12 will govern those trials.

13 It's a point strongly in favor of a stay with
14 respect to Apple, your Honor, because it will absolutely
15 simplify the issues. When we go to trial, if we go to
16 trial, if claims emerge and we go to trial, a large part of
17 the validity defense, maybe the entire validity defense with
18 respect to prior art, we don't know, may be gone.

19 There are obviously other validity issues.
20 There will be other issues. I'm not suggesting that there
21 may never be a trial. But it cannot be said that the
22 estoppel does not strongly weigh in favor of a stay because
23 it absolutely, by definition, simplifies the issues for trial.

24 So you have a situation, your Honor -- and I
25 understand that your Honor came in with a tentative ruling

1 and has given that thought, so I do want to make sure I
2 address the questions. But from our perspective, when you
3 look at the final factor, which I haven't address and maybe
4 I can do that quickly before I answer any additional
5 questions, and that is prejudice to the plaintiff, there
6 is no prejudice to the plaintiff here, your Honor. The
7 plaintiff has taken the position in papers, and it's not
8 surprising, they do not compete with the defendants. They
9 do not have a competing product with the defendants.

10 Most of the cases, your Honor, in which this
11 Court has denied motions for stay involved competitors, in
12 some cases involved situations where the plaintiff argued
13 that their business would be decimated, that they would
14 cease to exist. That was the position taken by the
15 plaintiff in the *Leader v Facebook* case and the *Cooper*
16 *Notification* case. Similarly, they were competitors, your
17 Honor.

18 It is very rare to deny a motion for a stay in
19 the instance such as this where the plaintiff is not a
20 competitor. It's been done. Your Honor did it in the
21 *Intellectual Ventures* case, I understand that. I'm not
22 representing that it can't be done or it has never been
23 done, but it is certainly unusual to do absent other
24 compelling factors such as delay on the part of the
25 defendants, which has not been the case here.

1 The reason we are where we are, your Honor, is
2 because the plaintiff -- from the procedural posture of
3 the case, there should be no question about this -- the
4 plaintiff injected the additional defendants and requested
5 that this Court reset the case and put us back at Square
6 One. And when you couple that with the fact that the PTO is
7 actively engaged in addressing issues, that will be directly
8 relevant to this case, all of the factors in our view
9 clearly weigh in favor of a stay.

10 The final point I will make, your Honor, unless
11 your Honor has questions, is your Honor in some of the
12 Court's decisions has also considered if there is prejudice
13 to the defendants in moving forward. And I understand that
14 is not one of the three typically enunciated factors but it
15 is a consideration your Honor has addressed before. And we
16 believe there will be prejudice, substantial prejudice with
17 having to proceed with this case particularly if a plaintiff
18 is allowed to amend the claims.

19 Just one point by way of background. Your Honor
20 may recall we had a protective order dispute long ago in this
21 case and we sought to preclude the plaintiff's law firm from
22 participating in any actions at the Patent and Trademark
23 Office. And your Honor denied that request. Your Honor said,
24 in fact, that reexaminations are part of the litigation, and
25 that the same law firm can review confidential information and

1 participate in the reexamination process.

2 So we could have a situation, your Honor, where
3 while this case is going forward, while Apple is producing
4 all of its confidential information, while other defendants
5 are producing confidential information, SoftView remains
6 free to amend its claims to continue to move that target
7 based on positions that Apple takes and the other defendants
8 take in the litigation and, of course, in the reexamination,
9 and that presents substantial prejudice to the defendants.

10 It also presents additional prejudice to the
11 defendants insofar as we have to plan this case. We have
12 to search for prior art. We have to try to prove the
13 invalidity of the claims. And to the extent that the claims
14 get amended, get changed, and the clock meanwhile for the
15 case has been moving forward substantially prejudices the
16 defendants' ability to prepare the defense in this case.

17 So all of those factors from where we sit, your
18 Honor, strongly weigh in favor of a stay. I understand your
19 Honor's tentative ruling and some of the questions your
20 Honor has addressed but to the extent there are other
21 things weighing on the Court's mind that in the Court's mind
22 favor denying the motion, I'd be interested in having the
23 opportunity to address them.

24 THE COURT: Sure. I think the only other thing
25 is what is your best guess as to how long these proceedings

1 in the PTO are going to take? And as I understand it, both
2 sides will have a chance to appeal if they're unhappy.

3 MR. KREVITT: Yes.

4 THE COURT: So how long of a stay am I signing
5 up for if I go with you?

6 MR. KREVITT: Well, it's fair question, your
7 Honor. I think the relevant inquiry with respect to time
8 doesn't involve the appeal because the appeal is, there is
9 an appeal from this case and there is an appeal from the
10 PTO. So the question is, which is going to get to the
11 appellate court quicker?

12 At the rate that the Patent and Trademark Office
13 is moving in this reexamination, we have every reason to
14 believe that that could wrap up relatively soon. Not next
15 week but certainly in less than a year.

16 The reason for that your Honor is given the Office
17 Actions that have already taken place, we expect, in the inter
18 partes reexam, an Office Action any day. That Office Action
19 hopefully, by no means certainly, but hopefully will reject
20 the remaining claims in the SoftView patents.

21 If it does, SoftView will have an opportunity to
22 respond, of course, and there may be additional actions, but
23 it is moving very quickly. Each of those Office Actions, as
24 your Honor may be aware, take place within a couple months
25 of each other roughly.

1 We have filed, as I said, the ex parte reexams.
2 We expect those -- we have hoped and asked and expect those
3 to get folded into the inter partes reexamination process.
4 Hopefully, that will move things quickly because then you
5 won't have extended it out by virtue of the ex parte reexam,
6 so we'll move along on the same schedule as the inter partes
7 reexam.

8 In that respect, your Honor, I should note we
9 have done everything we can at the Patent Office: responding
10 timely, trying to fold in the ex parte reexaminations, to move
11 the reexamination process forward as quickly as we possibly
12 can.

13 That's different than other cases that your
14 Honor has considered and denied motions, cases where your
15 Honor has put a case on a fast track, for example, where
16 there was a trial date set or a trial date set soon. None
17 of those factors exist here.

18 So we have every reason to believe, your Honor,
19 that we will get to the end of the reexamination process
20 more quickly than when we get to the end of the trial court
21 process before your Honor.

22 THE COURT: Okay. Thank you. I will leave a
23 little bit of time to briefly hear if there are other
24 defendants. Particularly if there are any other that are
25 going to stand up and say they're willing to be estopped, I

1 want them to rush up as well.

2 MR. CHU: We cede our time to said defendants.

3 THE COURT: Yes. Yes.

4 I see nobody rushing.

5 MR. THOMPSON: Let me just make a couple of
6 brief points.

7 First, your Honor asked whether you should
8 necessarily engage in a separate balancing for the new
9 defendants, maybe different from the Apple defendants.

10 I think that has to be the case. We have
11 separate actions. We have been severed for trial.

12 Now, I think the analysis will be very closely
13 similar. I think Mr. Krevitt did a very nice job of laying
14 out the factors for you which are common I think to all
15 defendants in most respects. But, remember, your Honor, the
16 newly added defendants are strangers to this case and
17 strangers to the reexamination proceeding.

18 We didn't know about this case until it was
19 filed on September 30th, some four or five months after the
20 reexaminations had begun. The die was cast, the table is
21 set. We had nothing to do with that. So I think that is a
22 significant difference weighing in favor of a stay for these
23 newly severed actions.

24 Putting that out a little bit further. If you
25 look at it from our point of view, at this stage of the case,

1 the case is just beginning, just got filed in September.
2 We're just now beginning to head towards discovery. It's very
3 early. It was a five-month headstart in the reexamination
4 process. And,

5 Finally, your Honor, and probably most
6 importantly, the final factor of unfair prejudice. I think
7 you look at that from a different prism when you think of the
8 newly added defendants.

9 Not only is there no unfair prejudice, these
10 defendants clearly could not be involved in any tactical
11 advantage. The reexaminations were filed. We've got
12 nothing to do with that.

13 And as Mr. Krevitt mentioned, there is no
14 competition here. There is no harm to SoftView. They don't
15 make any products. And as I mentioned earlier, with respect
16 to my client, there is no possible harm because there is no
17 more selling going on. A stay would not possibly prejudice
18 SoftView any further.

19 So for those reasons, we think, we encourage
20 your Honor to consider us separately. The balancing is
21 close, it is similar. But I do think it is important to
22 deal with separately for each of these newly added defendants.

23 With respect to estoppel, your Honor, I can't
24 represent that my client would be receptive to share the
25 full scope of the estoppel that Apple is facing. I would

1 suggest that if your Honor is inclined to consider a stay,
2 with some perhaps more narrow version of the estoppel, that
3 that might be something that my client would entertain.

4 I'm not here to commit to anything at the
5 moment, but if there is a way we could find efficiencies,
6 some reassurance that the stay would maximize efficiencies,
7 efficiencies for the newly added defendants, certainly Dell
8 would be interested in exploring that.

9 THE COURT: Okay. Thank you.

10 MR. THOMPSON: Thank you.

11 THE COURT: Is there anyone else?

12 MR. PARTRIDGE: I will be very brief, your
13 Honor, as I should be at this point. I'll address the
14 estoppel issue first.

15 I do think and I concur that if your Honor is
16 inclined to grant a stay, then I think my client Huawei is
17 open to considering an estoppel that goes so far as the
18 prior art combinations that have been asserted by Apple in
19 the reexaminations.

20 I haven't asked precisely that question to my
21 client, but if your Honor is inclined to stay, I think that
22 is a fair question to ask the defendants.

23 I don't think the estoppel should be of the
24 scope that the law provides with respect to Apple who
25 initiated the inter partes reexaminations because we have

1 not had the opportunity to choose the prior art to be
2 selected. We should not be precluded from finding and
3 asserting other prior art in the event these patents ever
4 come out of reexamination.

5 So a narrow version of an estoppel in a limited
6 period of time, maybe a week or so for us to all consult
7 with our clients and get back to your Honor, would make some
8 sense to me, speaking only for my client.

9 The second point I would like to make, your
10 Honor, is that you, as probably everybody else in this
11 courtroom today, have dealt with a lot of stay motions based
12 on reexaminations and other factors. I always ask myself a
13 question of what is happening and what will we know six
14 months from now that we don't know today?

15 I'm not as close to the inter partes and ex
16 parte reexaminations as Apple and its counsel are, but my
17 understanding is that we have reached the point where the
18 responses to the initial Office Action rejecting some claims
19 and confirming some others has been responded to by Apple,
20 and response to that has been made by SoftView, and we're
21 now awaiting the examiner's response to that, which could be
22 an action closing prosecution, could be a final rejection,
23 could be an interim action, and we should have that in a
24 relatively short period of time, when you look at how these
25 things normally transpire. That is going to tell us a lot.

1 The second thing we're going to know in the next
2 couple of months is whether the ex parte reexaminations are
3 granted. And this vector versus non-vector analysis that is
4 presented to your Honor will be joined further at the Patent
5 Office as a consequence of that.

6 So I sort of look at this from the standpoint of
7 what will we know three, six months down the road that we
8 don't know now that allows us to make a more informed judgment
9 about the wisdom of continuing a stay or not. And I would
10 suggest that your Honor consider that as a possibility rather
11 than embarking on Markman and other issues as to which the
12 activity at the Patent Office may significantly influence
13 those proceedings.

14 Thank you.

15 THE COURT: Thank you.

16 Are there any other defendants that wish to be
17 heard? No?

18 Okay. I'll hear from the plaintiff.

19 MR. LU: Thank you, your Honor. Samuel Lu for
20 SoftView.

21 I will begin by asking if further questioning or
22 presentation by me is necessary, if your Honor has
23 particular questions in mind.

24 THE COURT: No. I heard some things that give
25 me pause, so you should go ahead with your presentation.

1 MR. LU: Sure. I think the primary point that
2 I would like to make is that this case is distinguishable
3 from all of the other stay cases that are recited by the
4 defendants.

5 Why is that? Well, we have 14 out of the 20
6 claims in the inter partes reexamination confirmed. If you
7 take a look at the history of what happened here, Apple is
8 now on its third or fourth bite at the apple -- pun not
9 intended.

10 THE COURT: Unavoidable.

11 MR. LU: Unavoidable.

12 Apple filed a request for inter partes
13 reexamination and presented their A Team prior art.

14 Of the claims that they requested reexamination
15 on, 90, the PTO said, you know what? We don't see an issue.
16 We're not going to declare a reexamination on those 90 claims.

17 Apple wasn't satisfied with that. They petitioned
18 the PTO and said, look, you have to consider that. Here are
19 the reasons why.

20 The PTO said, okay, we'll take a look at it.
21 We'll grant your petition. And what did the PTO say? They
22 said we looked at your petitions, we looked at the prior
23 art, and we confirmed these claims.

24 So Apple then decides we're going to take a
25 third bite at the Apple. We're going to submit additional

1 briefing on these claims. Even though the PTO has already
2 said, you know, in the first instance we're not going to
3 declare a reexamination, in the second instance we'll take a
4 look at your arguments and we'll confirm these claims and in
5 the third instance that is now under consideration in the
6 inter partes reexamination.

7 Now, what did Apple do? Well, since the PTO
8 had already considered its A Team prior art, Apple then
9 submitted what I refer to as the B Team prior art: the
10 stuff that was disclosed in its invalidity contentions
11 but that Apple didn't consider to be the prior art that
12 was worthy enough to submit in its original inter partes
13 reexamination application.

14 But Apple wasn't satisfied with that. They
15 decided to take a fourth bite at the Apple by filing an ex
16 parte application using that same prior art.

17 So what we have here is a situation where the
18 PTO has already decided that 14 of the 20 asserted claims
19 in this case are confirmed. They are patentable. The new
20 prior art doesn't raise any invalidity issues in the PTO's
21 mind. This distinguishes our case from many of the other
22 cases. None of the other cases that I read made any
23 reference to allowed or confirmed claims being asserted in
24 the litigation.

25 THE COURT: Is it true that they break down on

1 this vector/non-vector distinction, and that it's the vector
2 claims that are confirmed as of the moment and it's the
3 non-vector that are rejected? Is that correct?

4 MR. LU: That is correct, your Honor. And as
5 I say, 14 of the 20 claims asserted contain the "vector"
6 limitation.

7 THE COURT: But address directly the argument
8 that clearly "vector" is an important term here and you all
9 are fighting it out in front of the PTO which has far more
10 substantive knowledge of these things than I do exactly what
11 "vector" means in the context of these patents. So doesn't
12 it follow that things will be simplified if I go ahead and
13 wait to see what the PTO does?

14 MR. LU: Well, the PTO apparently has already
15 taken a position on what "vector" means. If you take a look
16 at the PTO's response to Apple's inter partes reexamination
17 request, they do set forth its understanding of what "vector"
18 means. It's doubtful, I cannot imagine the PTO going
19 further beyond that because they have already taken a look
20 at this issue not once but twice.

21 THE COURT: So it sounds like you would
22 acknowledge there are some simplifying benefits from the
23 reexam, just that we have already gotten most of them.

24 MR. LU: We have already gotten them. Yes.

25 Now, one other point I would like to make on

1 Apple's reexamination request.

2 The prior art that is the subject of the ex
3 parte application, that is already before the PTO. We
4 disclosed all of the prior art identified by Apple in
5 their invalidity contentions as well as the contentions
6 themselves in the inter partes reexaminations. So that is
7 all part of the record that the PTO is considering and has
8 considered.

9 THE COURT: Are you willing to agree not to
10 amend any of your claims in the reexam?

11 MR. LU: We are willing to agree not to amend
12 any of the six that are still in the reexamination and being
13 considered. The other 14 have been confirmed. If the PTO
14 throws them into the reexamination again, we can concede on
15 that, too.

16 THE COURT: Say that again.

17 MR. LU: If the PTO throws those back into
18 reexamination, which we do not believe would occur, we would
19 agree not to amend those as well but only on the asserted
20 claims.

21 THE COURT: So of the 20 claims currently
22 asserted against Apple.

23 MR. LU: And to be asserted against the Android
24 defendants as well, yes.

25 THE COURT: You agree not to seek any amendments

1 to any of those 20.

2 MR. LU: We agree not to seek any amendments to
3 those 20.

4 THE COURT: Is that something you have advised
5 the defendants of prior to just now?

6 MR. LU: No, I don't believe so. I think it's
7 the first time the issue has been addressed head to head.

8 THE COURT: Right. Okay.

9 What is your estimate as to the timing of the
10 reexams? How long are they likely to take if I go ahead
11 and -- well, how long do you think they're going to take?
12 Because that is a factor.

13 MR. LU: Right. Well, the cases that we've
14 reviewed indicate estimates anywhere from four-to-eight years.
15 The fact of the matter is we now have two reexaminations both
16 on the same patent, and so assuming that they get consolidated
17 in front of the same examiner, then we would only -- you know,
18 we would have the estimated three to eight years. Who knows,
19 it may end up in front of a different examiner. So I don't
20 have an estimate.

21 What is clear is this case has been pending
22 against Apple for two years, and Apple continues to delay by
23 filing serial reexaminations, you know, the inter partes
24 followed by the ex parte. There is nothing to stop any of
25 the other defendants from filing reexaminations and we could

1 be in a situation where reexamination after reexamination
2 after reexamination is filed.

3 So my estimate is three and-a-half to eight years,
4 but it could be even longer if additional reexaminations are
5 filed because there is nothing stopping defendants from doing
6 so.

7 THE COURT: All right.

8 MR. LU: We should not be put in a situation
9 where SoftView's desire for relief and requests for relief
10 are stymied simply because parties continue to litigate this
11 case in a forum of their choosing the PTO by filing reexam
12 after reexam even after the PTO has considered their
13 arguments, even after the PTO has rejected their arguments.

14 THE COURT: Now, it is true you are not a
15 competitor so help me best understand the prejudice to you
16 if I go ahead and stay this case.

17 MR. LU: Well, the prejudice to SoftView is the
18 following. Documents, you know, disappear, memories fade.
19 It's the typical. It's a prejudice we articulated in our
20 briefs. SoftView is also a small company, and in this
21 particular case, we have already seen some of that prejudice
22 befall SoftView. For instance, one of the witnesses, for
23 instance, one of the witnesses we identified, a key witness
24 we identified in our initial disclosures, has passed away.
25 That is something that we anticipate would happen if this

1 case gets stayed for four to eight years.

2 THE COURT: Okay. Is there anything else you
3 want to add?

4 MR. LU: I think that's it, unless the Court has
5 any questions.

6 THE COURT: Just, what is your view on whether
7 I'm making one decision or whether I'm making eight or nine
8 different stay decisions?

9 MR. LU: I believe the Court should be making
10 one decision, especially given its statement with regard to
11 the notion of holding a single validity trial. It would
12 not make sense to be staying one case and proceeding with
13 another case because that would make the Court's job of
14 consolidating for purposes of the invalidity trial impossible.

15 THE COURT: Okay.

16 MR. LU: Thank you.

17 THE COURT: Thank you.

18 Mr. Krevitt, we made some news at least on
19 amendment. Does that change your mind?

20 MR. KREVITT: It tells me I should just keep
21 talking, your Honor, to see what further admissions I could
22 get.

23 THE COURT: If only I had all day.

24 MR. KREVITT: No. It's helpful, that is true.
25 I want to address a few points that were made.

1 I think, with respect, Mr. Lu's presentation
2 confirms why we need a stay in this case. Mr. Lu did not
3 address in any way the points I made, nor did he deny that
4 what happens in the reexamination with respect to the
5 allowed claims -- we're not talking about the rejected
6 claims now for the moment -- the allowed claims would be
7 relevant to this court proceeding.

8 Here is a promise I will make to your Honor.
9 My Markman brief, whenever I file it, will have the word
10 "vector" in it. Your Honor is going to have to construe
11 that term, that's a promise, unless your Honor declines to
12 do so.

13 That is the precise issue that the Patent
14 Office, which your Honor correctly said is the expert in
15 this area, looking at new prior art, that's the point,
16 looking at new prior art, that is the precise question that
17 the Patent Office is addressing.

18 I want to follow something Mr. Lu stated, and
19 it is critically important. Mr. Lu has said the PTO has
20 already taken a position regarding the meaning of "vector."
21 And that is kind of true. But here is the point. Mr. Lu
22 and SoftView hasn't agreed to that position.

23 The further news I can make is if Mr. Lu comes
24 to this podium and says we agree to accept and be bound
25 by the current definition of "vector" that the Patent and

1 Trademark Office offered, that might be a different story,
2 because then there wouldn't be -- at least to some extent,
3 the risk of losing further development in SoftView's
4 positions might be mitigated.

5 SoftView is not going to take that position.
6 And the reason SoftView is not going to take that position
7 is several:

8 First, we're arguing that even under that
9 definition, the prior art should render the allowed claims
10 invalid. SoftView is going to respond to that and explain
11 why the definition that the PTO has so far suggested is not
12 appropriate.

13 It's that very back and forth that your Honor
14 needs to conduct a fair and reasoned Markman process. There
15 can be, again, no question that if the Patent and Trademark
16 Office is considering the question of what is a vector, that
17 will simplify the issues here when your Honor has to address
18 the question of what is a vector.

19 Mr. Lu also was, with respect, misleading with
20 respect to what has happened in the reexamination process.
21 It is not at all the case, your Honor, that Apple took one
22 bite at the Apple with its A Team prior art, and then took
23 another bite at the apple with its B Team.

24 Apple has engaged in a reexamination process
25 in which the Patent and Trademark Office rejected most of

1 the claims, allowed I think it's fewer than a fourth of the
2 claims, but some small minority of the claims, and said
3 that the claim, the prior art submitted is missing certain
4 things. If you had these things, we might reject the claims.
5 It's missing this element and this element (indicating) and
6 it identified certain types of prior art that might have
7 those elements.

8 That is the prior art that Apple has now submitted.
9 It's not B Team prior art. It's directly responsive to what
10 the Patent and Trademark Office identified as reasons that
11 they have not yet rejected the 90 claims that have so far been
12 allowed.

13 The simplification that will happen, your Honor,
14 at the Patent and Trademark Office isn't even limited to
15 prior art issues. Of course, as your Honor is aware,
16 obviously the scope of the claims, what "vector" means, goes
17 directly to infringement issues.

18 But in this case, your Honor, it also goes to
19 112 issues, written description issues. It's our view that
20 there is not a written description for the way that SoftView
21 is attempting to apply its claims, the way it is trying to
22 read the claims to cover Apple's products. The position
23 that SoftView takes again with respect to the term "vector"
24 will be directly relevant to whether or not there is a
25 sufficient written description for that interpretation. It

1 goes to damages. It goes to a whole host of different issues.

2 The only other argument that I heard Mr. Lu
3 make was that SoftView would be prejudiced because of the
4 documents might go away. Well, that can be dealt with
5 easily, your Honor.

6 First, Apple has already produced documents.
7 Second, it's source code. That is what is alleged to
8 infringe here. That can be preserved. We will represent to
9 your Honor that any mechanism that will satisfy SoftView can
10 be employed to preserve that evidence. And,

11 Finally, although I don't represent the Android
12 defendants, I believe Mr. Chu said earlier it's all open
13 source. Everybody knows what it is. So I believe that
14 SoftView is already in possession of all the evidence they
15 would need to prove infringement, if they can, with respect
16 to the Android defendants.

17 So, your Honor, for all of those reasons, it
18 indisputably simplifies, and there is nothing you heard
19 from Mr. Lu to the contrary. Mr. Lu didn't even address the
20 question of the procedural posture in the case because there
21 is no dispute that this case is effectively at Square One by
22 virtue of SoftView's own conduct.

23 The prejudice we just addressed is substantial
24 for the defendants but it is minimal to the extent it exists
25 at all for SoftView. A stay is appropriate. And,

1 The final question you asked Mr. Lu that you
2 asked me also is timing. Mr. Lu said four to eight years, I
3 think, or three to eight years. That includes all appeals
4 that can be taken. This Court need not fashion a stay that
5 puts this case on hold until the last en banc petition is
6 filed. You could, courts have, fashion a stay that would
7 put this case in a stay until the activity at the Patent and
8 Trademark Office concludes.

9 The vast bulk obviously of the simplification,
10 the benefit of that simplification will be achieved. And
11 as I said and explained earlier, the reexaminations are
12 moving very quickly, and there is no reason to believe, and
13 none has been provided to your Honor, there is no reason to
14 believe that the reexaminations at the Patent and Trademark
15 Office level cannot be wrapped up in a period far, far
16 shorter, virtually wrapped up in the next year or so.

17 So for all of those reasons, your Honor, and
18 in comparison to the cases in which this Court has denied a
19 stay, every one of which until the *Intellectual Ventures*
20 case, involved competitors -- every one. Every one of which
21 had a trial date set -- every one. When you compare the
22 case that your Honor has denied stay with the facts, the
23 circumstances, the status of this case, your Honor, and the
24 clear indisputable simplification that will result from the
25 reexamination process, it is our strong view, your Honor,

1 that a stay is appropriate in this case.

2 THE COURT: Thank you.

3 Are there any other defendants?

4 MR. THOMPSON: Just a 30 second point, your
5 Honor.

6 Mr. Lu raised the specter of more reexaminations
7 and newly added defendants might file reexaminations.

8 Should your Honor choose to enter a stay, we
9 would certainly agree not to file reexaminations. This is
10 on behalf of Dell, but I believe the others would be of a
11 similar bent.

12 Thank you, your Honor.

13 THE COURT: Thank you.

14 Is there anyone else?

15 MR. PARTRIDGE: Your Honor, the patent holders
16 always argue the four-to-eight years which discounts what
17 is really happening in the Patent Office these days in light
18 of the AIA and the funding the PTO has received from the
19 Congress and hiring of new examiners and the like. They are
20 moving things along so old data doesn't fit today's world.

21 And I would offer, your Honor, by comparison
22 what is likely to happen here. If we had a trial in late
23 2013 in this case or even if it's as late as 2014, I don't
24 know when we will be able to fit on your calender, you can
25 consider post-trial motions associated with that for

1 resolution of those. We're into 2014 in this case as well
2 without even going to appeals to the Federal Circuit.

3 So relative to what is happening in the Patent
4 Office, with statutory time limits that admittedly don't
5 apply to inter partes reexamination here and the ex parte
6 reexamination but which are influencing the speed at which
7 the Patent Office is moving, I think we will be far along in
8 the Patent Office before we actually get to trial in this
9 case.

10 THE COURT: Okay. Thank you.

11 Well, I am not prepared at this time to take
12 my inclination and turn it into an order. By saying I was
13 inclined to deny the stay, I did not mean to suggest that
14 this was an easy decision. It's a close call. It's a
15 discretionary call. And,

16 I think in light of the arguments made today,
17 particularly representations that some of the defendants
18 might be willing to some degree be estopped by what is
19 going on in the PTO as well as the representation from the
20 plaintiff for the first time that it would be willing to
21 agree not to seek amendment of any of the 20 asserted claims
22 in the reexam -- I'm sorry -- they would not seek amendment
23 in the PTO of the 20 claims that are asserted here, I think
24 it is best to give you all a chance to further meet and
25 confer, firm up your positions with your clients obviously,

1 figure out exactly what you can offer and what you can't
2 offer and then talk to one another on the same schedule that
3 I have outlined earlier with respect to proposing a schedule
4 going forward, assuming this case does go forward.

5 So, mind you, we will get a written order out
6 that tells you exactly what we're looking for from you, but
7 I don't think it would be appropriate for me to rule on the
8 stay at the moment in light of what I have heard here this
9 morning.

10 So let's move on, finally, to the whole bucket
11 of other motions. We'll hear first from defendants on
12 those, please.

13 MR. FINN: Thank you, your Honor. Herbert Finn
14 on behalf of LG.

15 LG has moved to dismiss the indirect and
16 willfulness allegations based on SoftView's failure to plead
17 appropriate knowledge by LG.

18 At best, what SoftView has done is guess at what
19 LG knew or didn't know at the time before filing and after
20 filing. And it's not permitted or at least it's not the
21 appropriate basis under *Iqbal* or *Twombly* to make the
22 allegation.

23 I know this Court says it was undecided. Is
24 there any particular area that it has difficulties with that
25 it would like us to address?

1 THE COURT: Well, you say it's a guess. How
2 could a plaintiff ever, based on public information, prior
3 art discovery, know more than they allege with respect to
4 your clients?

5 MR. FINN: That is precisely the situation here,
6 your Honor. It's not based on public information. It's based
7 upon what SoftView says is private information, discussions
8 that they have had with a third party. And the third party
9 apparently never confirmed to SoftView that they told anyone
10 else about it.

11 THE COURT: But certainly -- I say certainly
12 but with a question mark at the end. Isn't it plausible to
13 think that the third party did tell your clients about the
14 discussions with SoftView?

15 MR. FINN: No, your Honor. I would actually say
16 it's unlikely. I don't believe.

17 THE COURT: Well, unlikely could still be
18 plausible.

19 MR. FINN: Well, plausible isn't the standard.
20 It's a reasonable influence.

21 THE COURT: Are you saying -- you are saying
22 by being a member of this aggregation service that it's
23 not a reasonable inference, that there would have been a
24 discussion between the aggregation service and your client
25 about the discussions with SoftView?

1 MR. FINN: At this point, there is no evidence.
2 There is nothing to support a reasonable inference that RPX
3 aggregator talked to LG or any of the other defendants.

4 THE COURT: So just to be clear, you are
5 definitely taking the position it is unreasonable to infer
6 that such discussions occurred? That's not even one of the
7 things that could possibly reasonably be expected to occur?

8 MR. FINN: It is. It is one of the things that
9 could occur.

10 THE COURT: So on a motion to dismiss, why isn't
11 that enough?

12 MR. FINN: Because it has to be more than just
13 one of the things. That is the plausible versus reasonable.
14 I think there is a distinction between plausible and
15 reasonable. Plausible is anything could happen. Reasonable
16 is it's likely to happen. And that is not the circumstances
17 here.

18 We've got a term sheet that indicates a
19 potential licensee. Well, they're a potential licensee
20 because SoftView came to RPX and indicated the mobile unit,
21 the mobile world would be a potential licensee.

22 So SoftView essentially told RPX who the
23 potential licensees were. And, more importantly, I think if
24 you look at page 8 of SoftView's opposition, they indicate
25 that they are guessing. Where they indicate that LG may

1 have had the knowledge, they don't know one way or the
2 other.

3 THE COURT: But, again, so that they know that
4 you are a number of RPX. They know they talked to RPX. You
5 acknowledged I think it is at least a reasonable inference
6 that RPX would have told LG about their discussions. So how
7 could a plaintiff ever know more than that?

8 They certainly don't have to prove to me today
9 here is the e-mail. Here is the conversation at which RPX
10 definitely told LG. If they can't find it in discovery,
11 then you move for summary judgment and presumably you win
12 summary judgment. Isn't that how it works?

13 MR. FINN: Well, your Honor, I think they have
14 to plead a little more. They haven't taken that step that
15 RPX has told LG.

16 THE COURT: So are you saying unless they can,
17 in good faith, you know, overcome Rule 11 and allege that
18 they know for sure that RPX told LG, that just cannot be a
19 basis for denial?

20 MR. FINN: Your Honor, they have to at least
21 make the allegation and they haven't done that. They
22 haven't made the allegation that RPX told LG or any other
23 member of the consortium of the aggregator that they were
24 told anything about the patents or the patent families. All
25 they have established is that they've had discussions with

1 this third party, RPX.

2 THE COURT: That's my focus seems to be the
3 pleading standard. I mean we're very early on and the
4 pleadings standard seems to be a big problem for you.

5 MR. FINN: Obviously, we disagree. We don't
6 think they have adequately pled. We believe the case law
7 requires more than just a disconnected step of we've talked
8 to a third party and you're somehow associated with that
9 third party without the allegation that that third party is
10 told anything about the patents or the information that that
11 third party received.

12 THE COURT: Now, they also allege that you
13 received service of the second amended complaint. Do you
14 agree that at least from the time after service of that
15 complaint that they have adequately alleged your knowledge
16 of the patents in suit?

17 MR. FINN: Well, at that point they have
18 adequately alleged knowledge of the patents in suit. However,
19 I don't believe that is the appropriate time period to look
20 for indirect infringement. You should be looking at the
21 prefiling. There should be no distinction as to why knowledge
22 during the course of the case would change the situation. In
23 fact, in this case, the second amended complaint is the
24 initial complaint that was received by LG.

25 So going on, you are essentially penalizing LG

1 for just continuing its business practices after having the
2 knowledge to go on with infringement without having put any
3 onus on SoftView to take steps to correct that.

4 THE COURT: So just looking at the time frame,
5 I think it was October of 2011, the time after which you
6 were first served with a complaint, you disagree that the
7 plaintiff can seek to recover for indirect infringement and
8 willful infringement that occurred after that date?

9 MR. FINN: That is correct, under *Xpoint* and
10 *Avacroft* (phonetic).

11 THE COURT: And is it because of lack of
12 knowledge or is it because of some other failing in the
13 claim?

14 MR. FINN: Well, it's when do you stop looking
15 at the knowledge. And our position is that the knowledge
16 has to be acquired prefiling.

17 THE COURT: All right. I think they also
18 allege, with respect to your client, all the media publicity
19 that apparently their original suit engendered and that that
20 somehow put you on notice. Address that.

21 MR. FINN: Well, that is even more specious than
22 the relationship we have with RPX. There is an allegation
23 that there was this widespread media blitz. There is no
24 allegation as to what is in the media blitz. There is no
25 allegation that LG even had knowledge of the articles

1 identified in the complaint, let alone read them, looked up
2 the patents and went to see what there was there.

3 Furthermore, under *EON v FLO TV*, which very
4 clearly said that merely being in the industry doesn't give
5 rise to gaining knowledge by any particular entity. I think
6 it's unfair just to say that, well, there is advertising
7 out there that has information on it and you should become
8 accustomed to it and read it and do some due diligence on it.

9 More importantly, the publicity that went on was
10 about the Apple OS which is an entirely different operating
11 system than what LG is being accused of infringement through.

12 THE COURT: Is there anything else you want to
13 say?

14 MR. FINN: No. That about covers it, your
15 Honor. Thank you.

16 THE COURT: Thank you.

17 Are there other defendants?

18 MR. THOMPSON: Yes, your Honor. Rod Thompson
19 again for Dell. Two discrete points for Dell.

20 With respect to the RPX allegations, we concur
21 with LG's arguments but Dell has an even stronger position.
22 The allegation against Dell is that Dell became a member of
23 RPX in April of 2010, and that is in paragraphs 41 and 59 of
24 the fourth amended complaint.

25 The alleged knowledge and the negotiation

1 discussions was a year earlier, in May of 2009. So not only
2 are they asking you to make the implausible assumption that
3 RPX tells all its members everything, they're asking you
4 to assume that RPX tells all its members, including new
5 members, a year later what happened a year before. That
6 simply implausible.

7 THE COURT: Implausible and unreasonable.

8 MR. THOMPSON: And unreasonable.

9 THE COURT: To some extent if this is an unfair
10 question, you can tell me that. You can't represent here
11 that if I disagree and you take discovery that we're not
12 going to find an e-mail or a witness from RPX that says, oh,
13 yeah, that is what we do. That is what we did in this case.

14 MR. THOMPSON: I have not undertaken that search
15 but, your Honor, there is a fishing expeditions everyday.

16 THE COURT: I suppose you would say something
17 can still be implausible even if it turns out to be untrue.

18 MR. THOMPSON: It can be highly unlikely, yes.

19 THE COURT: Is there anything else?

20 MR. THOMPSON: I believe your Honor asked about
21 the *EON* and *Xpoint* cases and referred to wilfulness as well
22 as indirect infringement. I think those cases and the
23 *Walker* case as well are careful not to disturb some of the
24 law on willfulness.

25 You need pre-suit knowledge. That just simply

1 following a complaint against the defendant is not going to
2 put that defendant on notice of the patent for purposes of
3 willfulness. The *Seagate* case is quite clear on that, your
4 Honor.

5 THE COURT: Thank you.

6 MR. THOMPSON: Thank you.

7 MR. ROSENBERG: Your Honor, Stuart Rosenberg
8 from Gibson Dunn & Crutcher on behalf of AT&T. I'd like to
9 quickly address the allegations of pre-suit knowledge
10 against AT&T because they're different than the allegations
11 against the Android manufacturers. They don't concern this
12 third-party patent aggregation company.

13 And I think also it's important to note at the
14 outset that AT&T is in a different position having been in
15 the case since the first complaint. There has been document
16 discovery of AT&T and so the questions about what SoftView
17 might find, might be able to uncover through discovery, they
18 already had some opportunity to do that.

19 There are three allegations for how AT&T
20 allegedly acquired knowledge of the patents in suit before
21 being sued:

22 The first is that because a patent issued to
23 Bell South, not AT&T, that Bell South, which is allegedly a
24 related company, cites on its face a 2002 publication about
25 not the patents of suit but of the parent application for

1 the applications of the parent in suit, that therefore
2 somehow that put AT&T on notice of the patents in suit which
3 didn't issue until the '353 patent, didn't issue until 2008.

4 In fact, the application for it wasn't even filed
5 until 2005, which was three years after this publication was
6 cited in the Bell South patent, a year after the citation
7 itself which happened during the course of prosecution.

8 So we just think that the chain of inferences
9 to get from that one citation in the Bell South patent to
10 AT&T's knowledge of an issued patent that wasn't cited is
11 just too tenuous and implausible. Unreasonable, not
12 plausible.

13 The second allegation in the complaint about
14 AT&T's pre-suit knowledge is that AT&T has some unspecified
15 "connection" to Mr. Rohrbach, who is one of the named
16 inventors on the patent in suit. This is at paragraph 40 of
17 the amended complaint.

18 We said in our opening brief for this motion
19 to dismiss that SoftView has failed to identify what this
20 alleged connection is, no who, what, where, when, and why,
21 and that therefore that doesn't supply us as an allegation
22 for pre-suit notice.

23 SoftView didn't address that contention at all
24 in its response brief and we believe that that waives that
25 argument that it would suffice as a plausible allegation of

1 pre-suit knowledge. And,

2 Finally, SoftView's complaint alleges that AT&T
3 had pre-suit knowledge of the patents in suit because of its
4 "relationship with Apple" and the fact that AT&T was at one
5 point the exclusive carrier for the iPhone before other
6 carriers got into the business of selling the iPhone.

7 We don't think that is plausible because, among
8 other reasons, SoftView has now had opportunity to take
9 discovery that Apple and AT&T and if there were anything to
10 support that chain of inferences, that because SoftView told
11 Apple about the patent in-suit before filing, that therefore
12 Apple must have told AT&T, there would be something to put
13 in the complaint or at least some allegation on information
14 and belief there was such a conversation, but instead all
15 the complaint alleges is that Apple knew we because we told
16 Apple. Apple and AT&T had a relationship. Therefore, AT&T
17 must have known, and we don't think that is sufficient.

18 THE COURT: Assume for the moment that I agree
19 with you. Why should the relief not be not to give them a
20 chance to amend their complaint to see if they can bulk up
21 the knowledge and intent allegations as opposed to just
22 dismissing with prejudice?

23 MR. ROSENBERG: Two reasons, your Honor. The
24 first is since they already had the case pending for long
25 enough to take that discovery, we feel like if they had been

1 able to find it, they should have been able to. They had
2 the opportunity, and having come up with it, it's now late
3 enough in the case, that it should be in the complaint if
4 they have it.

5 Second is, with respect to willfulness, we
6 think in particular the fact that the Federal Circuit has
7 explained that you need pre-suit knowledge in order to
8 maintain the case for willfulness, absent extraordinary
9 circumstances; and that they haven't come up with anything
10 yet means that issue should be put to rest and shouldn't be
11 hanging on AT&T's head when there is no foundation for it.

12 THE COURT: And it seemed with respect to AT&T
13 that there was some wait at the December 2008 date? I'm not
14 quite sure what the relevance of that was.

15 MR. ROSENBERG: I believe that is what the '353
16 patent issued and that is why that date.

17 THE COURT: That is why that date is mentioned.

18 MR. ROSENBERG: That date is mentioned several
19 times.

20 THE COURT: All right. Thank you very much.

21 MR. ROSENBERG: Thank you.

22 THE COURT: Are there any other defendants?

23 MR. WILLIAMS: Yes, your Honor. Eliot Williams
24 for Huawei, one of the Android defendants. I just want to
25 make one more point about this RPX issue. Actually, two

1 points.

2 First, the allegations as to Huawei are slightly
3 different. They are probably the smartest system of any of
4 the RPX-related allegations in the fourth amended complaint.
5 Their plaintiff is trying to rely solely on the fact we were
6 a member of RPX and the date disclosed to RPX. So there is
7 no other fact alleged that would lead the Court to draw the
8 inference that it's asking to draw, which is that we were
9 then somehow provided with notice of this particular patent.

10 The other point I wanted to make, we do cite in
11 our joinder brief some case law that suggests the inference
12 they want you to draw which is to impute the knowledge of
13 RPX to Huawei is legally impermissible. So you cannot just
14 impute knowledge from RPX to Huawei because we're a member
15 of this organization. So, therefore, they need to make this
16 allegation there was actually notice provided. That is an
17 allegation which they are unwilling and unable to do because
18 it's not anywhere in the complaint.

19 So for that additional reason, we think that
20 what the complaint is asking to do is really to violate the
21 rules in *Twombly* and *Iqbal*, and they have to get above the
22 speculative level they're asking to make a speculation that
23 is legally impermissible. For that reason, we think those
24 allegations are insufficient to show the notice.

25 THE COURT: Now, Rule 9(b) does not apply here;

1 correct? 9(b) applied to fraud allegations; correct?

2 MR. WILLIAMS: Correct. Yes.

3 THE COURT: Now, even under Rule 9(b), you can
4 allege knowledge generally, can't you?

5 MR. WILLIAMS: Well, there would have to be an
6 allegation of how they -- in a Rule 9(b) case where you are
7 alleging fraud, there would have to be some allegation as to
8 what the fraudulent conduct was, something specific. Here,
9 there is nothing specific about notice.

10 I mean if it's true that RPX provided notice
11 to Huawei that alleged that, we'll fight it out. We may
12 disagree, we'll prove they're wrong, and we'll move for
13 summary judgment, but they haven't alleged that. They
14 refused to allege that. They're asking the Court to make
15 this next step for them which we think is just legally
16 impermissible.

17 THE COURT: But I do have to draw a reasonable
18 inference in their favor; right?

19 MR. WILLIAMS: Right. As I'd said, I think they
20 are asking you to draw one that is legally impermissible
21 which is to impute the knowledge. If there was an actual
22 communication, let's test that out, let's find that out on
23 discovery, and we'll deal with that on summary judgment, but
24 it's not being engaged and since we're here on a pleading
25 motion, they need to make the allegation if that is the

1 direction they want to take this case on.

2 THE COURT: Okay. Thank you.

3 Is there anybody else?

4 MR. SHAW: Good morning, your Honor.

5 THE COURT: Good morning.

6 MR. SHAW: John Shaw for HTC.

7 I originally intended to come up to talk about
8 one factual difference for HTC but you asked a question
9 which I can give a little more information on, or two of
10 them. One on dismissal versus allowing repleading.

11 The Third Circuit in recent years has allowed
12 and affirmed the District Courts dismissing after there have
13 been at least one amendment already on grounds that you need
14 to control the docket and put plaintiffs to their proofs and
15 their pleadings early on. So there is authority for you to
16 do it, although you certainly have discretion to go in
17 either direction.

18 The different fact for HTC was that HTC filed a
19 DJ action in Washington after the motion to amend was made
20 before the complaint was actually filed. I was going to
21 comment on that basically to say that that puts the DJ in
22 the same position as getting served with a complaint.

23 But your Honor then asked the question: Is
24 filing the complaint enough to sustain willful infringement
25 after the complaint is filed? I think the answer there

1 should also be no.

2 Now, people have mentioned *Seagate* up here and
3 the reason it's no is this: *Seagate* came out in a time when
4 there was a lot of debate about opinions of counsel and what
5 is the scope of discovery of opinions of counsel, including
6 trial counsel.

7 *Seagate* in that context tried to draw the line at
8 the complaint to cut all those issues out and, put a different
9 way, in which is we can test objective recklessness about
10 whether or not the motion for preliminary injunction was
11 filed.

12 *Seagate* now adds *Twombly* into the mix looking
13 for specific facts and simply filing the complaint and
14 having the complaint on file doesn't do anything for
15 specific facts other than knowledge. It doesn't show or
16 plead anything about objective recklessness and conduct or
17 for the inducement of infringement, anything about specific
18 intent to cause the acts of infringement.

19 That is why simply filing the complaint should
20 be the cutoff date for those and, while it may be the
21 knowledge component, doesn't meet the rest of pleading some
22 fact that is plausible to show those two causes of action.

23 THE COURT: Okay.

24 MR. SHAW: Thank you.

25 THE COURT: Thank you very much.

1 MR. BOICE: One more very briefly, your Honor.
2 Bill Boyce from Kilpatrick Townsend on behalf of Motorola
3 Mobility. Just to a factual issue.

4 At the time that the disclosure was allegedly
5 made to RPX of the patent, the '353 patent and the patent
6 application, Motorola was not a member of RPX. It was July
7 of 2009 when that disclosure was made. Motorola was not a
8 member of RPX until 2010, over a year later from that.

9 So the allegation is at the disclosure, it was
10 contemplated that RPX would sublicense these patents or license
11 these patents to potential parties. Then on information and
12 belief, they say the allegation is that, well, they must have
13 then talked to Motorola as a potential sublicensee. Again,
14 you are piling speculation on speculation here, and that is
15 not adequate to create an inference of actual knowledge at
16 that time.

17 Thank you.

18 THE COURT: Thank you.

19 MR. DORFMAN: To finish up, good morning, your
20 Honor.

21 THE COURT: Yes.

22 MR. DORFMAN: Michael Dorfman from Katten Muchin
23 Roseman for Kyocera.

24 I wanted to point out, this was in our papers
25 and SoftView agrees, Kyocera was not a member of RPX, so the

1 only allegations of prefiling notice relating to Kyocera
2 relates to publications identified in SoftView's complaint.
3 For the reasons in LG's motion and argument, we believe that
4 those are insufficient.

5 THE COURT: Okay. Thank you very much.

6 MR. BOICE: Thank you.

7 THE COURT: Is that it from defendants?

8 Okay. Let's hear from plaintiff.

9 MR. LU: Your Honor, Sam Lu again.

10 I just wanted to point out one case that was
11 cited in LG's reply. Other than that, I'm happy to stand on
12 our papers unless the Court has questions that it would like
13 to follow-up.

14 The case that I wanted to point out is that LG
15 cited the *Anascape* case for the proposition that postfiling
16 activity, postfiling notice based on patent complaint
17 couldn't give rise to willfulness.

18 Now, we have address that in the *DataQuill* case
19 and the other cases that we cited. But even this case cited
20 by LG does not stand for the proposition that postfiling
21 knowledge is an absolute bar to a finding of willfulness.

22 What *Anascape* says is "the Court does not oppose
23 a categorical rule that lack of a motion for preliminary
24 injunction automatically bars post-suit willful infringement
25 but rather finds that in these particular circumstances,

1 Anascape's post-suit conduct coupled with lack of any
2 evidence of pre-suit notice of the '700 patent establishes
3 that there is no willful infringement by either defendant."

4 So this was a motion for summary judgement that
5 was brought in the *Anascape*. But even then, the Court made
6 quite clear, notwithstanding LG's citation to it in the
7 briefs, that there was no absolute bar to a finding of
8 willful infringement based solely on postfiling conduct.

9 THE COURT: If I conclude that all that you
10 have properly alleged is knowledge from the service of the
11 complaint, just assume that for the moment, then you
12 acknowledge you can't recover for any alleged indirect or
13 willful infringement prior to initiation of the suit? Do
14 you concede that?

15 MR. LU: Yes, I would concede that.

16 THE COURT: Then break down for me, again -- and
17 you just alluded to it but I need you to be more precise for
18 me -- what is it that you think knowledge of the suit just
19 arising from the service of the complaint, how does that
20 support indirect infringement and willful infringement for
21 the post-suit period?

22 MR. LU: Okay. So for indirect infringement,
23 the infringer's activities continue after the complaint is
24 filed. And Judge Robinson, in deciding the *Walker Digital*
25 case, indicated that "if a complaint identifies for purposes

1 of Rule 8 the patent at issue and the allegedly infringing
2 conduct, the defendant's receipt of the complaint and
3 decision to continue its conduct despite the knowledge
4 gleaned from the complaint satisfies the requirements of
5 *Global Tech* and therefore sufficiently pleads indirect
6 infringement."

7 In other words, they receive knowledge of the
8 patent as of the date the complaint was served. They
9 continue to engage in an infringing activity for which
10 damages are available and for which the claim of direct
11 infringement is available. That gives SoftView the right
12 to recover for those sort of damages.

13 THE COURT: And then on willfulness.

14 MR. LU: Well, on willfulness it's a little
15 bit different question. And the issue -- and I may have
16 misspoke a little bit earlier. The issue really that is
17 that the defendants are arguing that it is an absolute bar
18 to any finding of willful infringement if you can't show
19 knowledge of the patent prior to the filing of the complaint.

20 I have not looked into the issue of whether --
21 I have looked into the issue that if you can show knowledge
22 of the patent after the filing of the complaint and that
23 is based on postfiling conduct, that is sufficient for a
24 finding of willful infringement going forward. That is what
25 is in the cases that we cited, including the *Anascope* case

1 cited by LG.

2 THE COURT: All right. Then come to the issue
3 of knowledge and what is reasonable to infer from your
4 pre-suit allegations, specifically, with RPX. Why not come
5 out and allege that they actually got knowledge from RPX?

6 MR. LU: Your Honor, as pointed out, there are
7 specific requirements under Federal Rule of Civil Procedure
8 11. And we are nothing if not adamant about following that.
9 And as a result of that, we know certain facts that we can
10 confirm. There are other facts that we believe exist but we
11 do not have proof out there.

12 Your Honor identified the issue which is the
13 following: How would a plaintiff ever prove up the knowledge
14 of a defendant, accused infringer if they have to plead those
15 facts before they had the opportunity to take discovery? And
16 that is what the defendants are effectively attempting to do
17 today. They're attempting to make us go through the proof
18 that would otherwise be required in a motion for summary
19 judgment but in the context of a motion to dismiss.

20 We haven't yet had the opportunity to take
21 discovery, including from AT&T, on the issues that the
22 AT&T lawyer addressed. If we had the opportunity to take
23 discovery, including discovery from RPX, for instance, or
24 discovery for the AT&T and Apple representatives, business
25 representatives who address patent issues between themselves

1 and we were unable to get confirmation as such communications
2 took place, then it would be perfectly appropriate for a
3 motion for summary judgment to be brought.

4 But this is a motion to dismiss. We have made
5 allegations that are reasonable, more than plausible and
6 that is all that's required. Because the Court, under a
7 motion to dismiss, in deciding a motion to dismiss, must
8 take our allegations to be true and see what reasonable
9 inferences can be draw from that.

10 It is imminently reasonable for the notion that
11 RPX, a patent aggregation firm whose business is approaching
12 members of the firm and saying, look, here is what you got
13 for your money. We're able to get these patents. It is
14 eminently plausible that they had a discussion regarding the
15 '253 patent and we want to take discovery and confirm that.

16 It is also plausible that RPX, a company whose
17 business model includes recruiting new members by saying
18 here is what we have in the works, here is the IP that we
19 available, here is what we can get, would have communicated
20 to those members the fact that they were in discussions with
21 SoftView and the '353 patent.

22 THE COURT: Okay. Is there anything else?

23 MR. LU: Not unless your Honor has further
24 questions.

25 THE COURT: No, you answered my questions.

1 MR. LU: Thank you.

2 THE COURT: All right. Any defendants?

3 MR. FINN: Yes, your Honor. I'll start where
4 Mr. Lu just left off.

5 Mr. Chu, when we were arguing the 299 motion,
6 made a very pointed statement and said that he hasn't had
7 any of the defendants stand up and say in a very clear
8 statement that they didn't have knowledge of these patents
9 prior to filing.

10 Frankly, that is all defendants are asking for
11 right now is a very clear allegation in the complaint that
12 LG and the other defendants, on information and belief,
13 received the information from RPX. SoftView has not wanted
14 to say that. I don't know why, but they're unwilling to do
15 that anywhere in the complaint.

16 They've had many, many opportunities to say they
17 talked to RPX. RPX knew about the patents. RPX turned
18 around and told the various members not only that we had
19 these discussions but about the patents. SoftView hasn't
20 done that. It's a deficient pleading.

21 With respect to Mr. Lu's comment on *Anascope* and
22 willfulness and whether or not it is possible to have a
23 willful case after filing, having knowledge after filing,
24 yes, it's not LG's position that Seagate is an absolute
25 bar to a willfulness allegation based upon postfiling

1 information.

2 *Seagate* itself says under extraordinary
3 circumstances that could happen. We don't have those
4 circumstances here. And, in fact, Judge Robinson, in the
5 Adeline (phonetic) case, points out, a case they want to
6 rely on for indirect infringement, points out that typically
7 in these circumstances, it's all prefiling knowledge that is
8 to be considered.

9 To the extent that SoftView complains that they
10 didn't bring a preliminary injunction or didn't take any
11 action as LG and some of the other defendants would ask them
12 to take, that would essentially turn *Seagate* on its head.
13 *Seagate* says you will get prefiling absent the extraordinary
14 circumstances, the extraordinary circumstances going for the
15 preliminary injunction and doing what they need to do to try
16 to stop the early infringement allegations and stop the
17 alleged infringer from continuing on.

18 THE COURT: Thank you.

19 Are there other defendants?

20 MR. ROSENBERG: One point very briefly, your
21 Honor on AT&T.

22 I heard Mr. Lu say that he believes SoftView
23 hasn't had an opportunity to take discovery of AT&T on these
24 issues. I frankly disagree just as a matter of how long the
25 case has been pending against AT&T. We haven't received a

1 deposition notice, written document requests, interrogatories,
2 But there is nothing to stop SoftView from taking the discovery
3 sought. Thank you.

4 THE COURT: Thank you.

5 Is there anyone else?

6 Okay. Well, I will take these motions to
7 dismiss under advisement. As I indicated, we'll get a
8 short written order out memorializing the guidance I gave
9 you earlier and directing you to give us some further
10 submissions.

11 Is there anything else that plaintiffs wish to
12 raise at this time while we're all here?

13 MR. CHU: No, your Honor.

14 THE COURT: Defendants, anything else?

15 MR. PARTRIDGE: No, your Honor.

16 MR. FINEMAN: No, your Honor.

17 THE COURT: All right. That looks like a no.

18 Thank you. We will be in recess.

19 (Hearing ends at 12:14 p.m.)
20
21

22 I hereby certify the foregoing is a true and accurate
23 transcript from my stenographic notes in the proceeding.

24 /s/ Brian P. Gaffigan
25 Official Court Reporter
U.S. District Court